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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner*,

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND FOUR APPENDICES

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January 15, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. .....

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY (formerly Fidelity and Columbia Trust Company), Joint Administrators with the Will Annexed of the ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND FOUR APPENDICES

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Patricia R. Smith, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 17, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court was filed and entered on March 4, 1961, a copy of the said opinion is contained in the Record as printed for the United States Court of Appeals for the Sixth Circuit, which was printed in the Transcript of Record, Volume II, which was filed as an Appendix on June 25, 1963, with the Brief for the Defendant-Petitioner in the United States Court of Appeals for the Sixth Circuit, and is filed herewith and marked Petitioner's Appendix C hereto, see R. Vol. II, pp. 1607a-1629a, is reported in 192 Federal Supplement 396 (1961). A timely Petition For Rehearing was filed by Patricia R. Smith, on April 3, 1961, printed in Appendix C hereto, R. Vol. II, pp. 1646a-1691a. The opinion of the United States Court of Appeals for the Sixth Circuit, was filed and entered on April 17, 1964, and is printed in Appendix D hereto, Transcript of Record Volume III, pp. 2369a-2381a, is reported in 330 F. 2d 483 (1964).

The judgments of the District Court, granted on the Respondents, the two Trust Companies' Motions For Summary Judgments were filed and entered on November 9, 1962, and is printed in Appendix C hereto, R. Vol. II, pp. 2092a-2093a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed, was filed and entered on April 17, 1964, printed in Appendix D hereto, R. Vol. III, pp. 2368a-2369a.

A timely Petition For Rehearing was filed by the Petitioner Patricia R. Smith, on July 6, 1964, printed in Appendix D hereto, R. Vol. III, pp. 2446a-2575a, and was denied and an Order entered thereon, on August 19, 1964, R. Vol. III, p. 2576a, and a second opinion of the Circuit Court of Appeals was filed on the denial of Patricia R. Smith's Petition For Rehearing on August 19, 1964, consisting of two pages, printed in Appendix D hereto, R. Vol. III, pp. 2576a-2579a.

An order granting an extension of time within which the Petitioner Patricia R. Smith could file a Petition For Writ of Certiorari in this Court, was filed and entered in this Court on November 6, 1964, extending the time to January 16, 1965.

The statutory provision believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari, is invoked under 28 United States Code, Section 1254(1), on the grounds that the Court of Appeals has (1) decided important questions of state law in a way not in accord with the applicable law of Kentucky and (2) has sanctioned such a departure by a lower court from the accepted and usual course of judicial procedure as to conflict with applicable law and to call for an exercise of this Court's power of supervision.

(3) By the rulings of the District Court, which was upheld by the Court of Appeals, the rights of the Petitioner Patricia R. Smith, under the Fourteenth Amendment to the Constitution of the United States, have been violated, and especially that portion thereof which authorizes this Court by writ of certiorari to review final judgments of a Circuit Court of Appeals, wherein a Federal question is involved, and wherein it states that,

> "No State Shall Make Or Enforce Any Law Which Shall Abridge The Privileges Or Immunities Of Citi-

zens Of The United States; Nor Shall Any State Deprive Any Person Of Life, Liberty, Or Property, Without Due Process Of Law; Nor Deny To Any Person Within Its Jurisdiction The Equal Protection Of The Laws."

The District Court, and the United States Court of Appeals for the Sixth Circuit, both denied the Defendant-Petitioner Patricia R. Smith, the right of a trial, either with, or without a jury, on the issues raised in the Complaint of the two Trust Companies, the joint administrators of the Estate of John A. O'Brien, filed on September 13, 1956, printed in Appendix B hereto, R. Vol. I, 16a-45a, all of which were denied and controverted in the Answer and Counterclaim which was filed by the Defendant-Petitioner Patricia R. Smith, on November 12, 1956, printed in Appendix B hereto, R. Vol. I, 121a-139a, and all of which conclusions of law and fact resulted in depriving the Defendant-Petitioner of her property, without due process of law, and all of which ruling and conclusions deny the Defendant-Petitioner the equal protection of the laws, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States. Such rulings of the District Court together with the rulings of the Circuit Court of Appeals, in its opinion, will result in a confiscation of the property of Patricia R. Smith, and a deprivation of two-thirds of the value, or values, of property to which she was entitled, and inherited from John A. O'Brien's Estate, to which she was the sole beneficiary under his last will, and of his entire Estate, as so held by the Court of Appeals of Kentucky, in a Rescission suit, which was filed against only the brothers of John A. O'Brien. The Petitioner now asserts that this is a denial insofar as she is concerned, of the equal protection of the laws of the United States, and a violation of the Fourteenth Amendment of the Constitution of the United States as set out above.

The Petitioner Patricia R. Smith, was denied the right under a "Motion (filed on February 23, 1957), For Leave To File An Amended Answer and An Amended Counterclaim," with the First Amended Answer and First Amended Counterclaim and Exhibits from "A" to "G," attached thereto, and tendered therewith, to Surcharge and Falsify the two Trust Companies' purported final settlements of the accounts of the estate of her husband John A. O'Brien, printed in Appendix B hereto, R. Vol. I, pp. 164a-330a, and the defendant-petitioner was denied the right under her Motion (filed on May 15, 1961), To File A Second Amended Answer And A Second Amended Counterclaim, with The Second Amended Answer and Second Amended Counterclaim and Exhibits from 42 through 75, attached thereto and tendered therewith (excepting Exhibit No. 51 which was inadvertently omitted), such ruling was in violation of Rule 15, of the Federal Rules of Civil Procedure, and the statutes and law of Kentucky, governing the final settlement of the accounts of an administrator, in Kentucky.

With these facts being pointed out, we ask a re-examination of the entire case, and the grounds on which the District Court granted the two Trust Companies' Motions For Summary Judgments, and awarded to the two Trust Companies the joint administrators of the Estate of John A. O'Brien, and their lawyers, over two hundred eighteen thousand four hundred seventy-two dollars and eighty cents ($218,472.80), for fees and interest, for representing the Estate of John A. O'Brien, (which the Trust Companies swore under oath in the inventory and appraisement which they filed, on May 31, 1934, in the Jefferson County Court, that it only had a market value of five hundred nine thousand two hundred ninety-five dollars and ninety-seven cents ($509,295.97) Exhibit No. 75, printed in Appendix C

hereto, R. Vol. II, pp. 1982a-1989a), without a trial on the issues involved in the joint administrators' purported final settlement of their accounts of the Estate of John A. O'Brien, together with the conclusions of law of the District Court and the Court of Appeals, as being in violation of the Fourteenth Amendment of the Constitution of the United States, and Rule 15, of the Federal Rules of Civil Procedure, and that this Court, in its final opinion upon this Petition for Writ of Certiorari, shall say whether or not the Kentucky Revised Statutes and laws of Kentucky, and the above provisions of the Constitution of the United States have or have not been violated by the rulings of the District Court, which was fully upheld by the United States Court of Appeals for the Sixth Circuit, and whether or not Rule 15, of the Federal Rules of Civil Procedure has been violated.

The Federal question thus raised was specifically passed upon by the United States Court of Appeals for the Sixth Circuit adversely to the Petitioner Patricia R. Smith, in the opinion denying the Petitioner's Petition for Rehearing, printed in Appendix D hereto, R. Vol. III, pp. 2576a-2579a.

QUESTIONS PRESENTED FOR REVIEW

1. In deciding that a District Court can take jurisdiction of the final settlement of the accounts of an estate, in Kentucky, which is definitely a probate matter, in order to approve the final settlement of the accounts of an estate, by two Trust Companies, who are the joint administrators of an estate, and approve all their acts and deeds over a period of thirty years of handling the said estate, without a trial of the case, and grant the two Trust Companies' Motions For Summary Judgments, and award to the two

Trust Companies the joint administrators, and their attorneys, over two hundred eighteen thousand four hundred seventy-two dollars and eighty cents ($218,472.80) for fees and interest, but deny the sole beneficiary of the will of the decedent, and of the entire Estate, the right to have a trial on the issues involved in the action or to file an amended answer and an amended counterclaim with seven exhibits, to surcharge and falsify the purported final settlement of the accounts of the estate, filed by the two Trust Companies who are the joint administrators of the decedent's Estate, within five years after the purported final settlements of accounts of the Estate are approved by a judge, of a County Court in Kentucky, as provided for by Kentucky statutes and law, did the Court of Appeals decide an important question of Kentucky statutes, and Kentucky law, in a way in conflict with applicable Kentucky decisions?

2. In deciding that the Defendant Patricia R. Smith could not file a first amended answer and a first amended counterclaim, with seven exhibits, or a second amended answer and a second amended counterclaim with exhibits numbering forty-two (42) through seventy-five (75), as provided for by Rule 15, of the Federal Rules of Civil Procedure, did the Court of Appeals violate the Rules of the Federal Rules of Civil Procedure?

3. In an action brought by Kentucky citizens in a Circuit Court, and removed to a Federal District Court, in Kentucky, because of diversity of citizenship, by two Trust Companies who are the joint administrators of an estate, which is the third settlement suit filed by the joint administrators in the Jefferson Circuit Court at Louisville, Kentucky, in the Estate of John A. O'Brien, affecting a partnership agreement, contracts, and property in Kentucky, involving the statutes and intricate questions of Kentucky

law, governing the duties of administrators in the administration of, and the final settlements of their accounts of an estate in Kentucky, has the Court of Appeals, by affirming the denial of the Motions of the Defendant-Petitioner for leave to file any amendments to her original Answer and Counterclaim, sanctioned a radical departure from accepted standards of judicial procedure?

4. In an action brought by two Trust Companies the joint administrators of an estate in Circuit Court in Kentucky, for the final settlement of their accounts of an estate, which is the third settlement suit filed and prosecuted in the said estate, by the joint administrators, and removed to the Federal Court in Kentucky because of diversity of citizenship, has the Court of Appeals, by affirming the denial of the right of the sole beneficiary of the will and the estate of the decedent, to have a trial on the issues involved in the action, sanctioned the violation of the Fourteenth Amendment to the Constitution of the United States, and denied the Defendant Patricia R. Smith of her property, without due process of law?

STATUTES INVOLVED, THE CONSTITUTION SECTION INVOLVED, AND RULES

This case is controlled principally by the Statutes of Kentucky, the decisional law of Kentucky, the Fourteenth Amendment to the Constitution of the United States, Section 1, and by Rule 19 of the Rules of the Supreme Court of the United States. The principal statutory provisions involved are annotations from the general Statutes of Kentucky from 1873 to the Kentucky Revised Statutes of today covering Kentucky County Courts, acting as Probate Courts, and the requirements for the final settlements of the accounts of administrators of Estates in Kentucky,

with some of the Kentucky law citations which apply thereto, taken from the Kentucky Revised Statutes, which are as follows:

ANNOTATIONS FROM THE GENERAL STATUTES OF KENTUCKY, FROM 1873 TO THE KENTUCKY REVISED STATUTES OF TODAY

The Statute Revision Committee of Kentucky prepared annotations on all the cases pertaining to the Statutes in Kentucky, naturally it covered our Statutes on County (Probate) Courts, more particularly with KRS 25.170 (1062; 1065) 1893, c. 221, Sections 42, 45.

Note: The origin of Section 1062 was G.S., Ch. 28, Art. XIV, Sections 1, 2. The origin of Section 1065 was G.S., Ch. 28, Art. XIV, Section 2.

The Court's attention is particularly called to the case of *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

ANNOTATIONS

Finality of settlement—A settlement is not conclusive, either upon the parties opposing it or the court, *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808; *Andrews* v. *McCarty,* 208 Ky. 25, 270 S.W. 466.

The confirmation of a settlement is a ministerial rather than judicial act. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A settlement is not a final adjudication in favor of one person or against another, or upon any question of prop-

erty or personal rights. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A formal entry of the order of confirmation of the settlement, in the absence of exceptions, is not a final judgment from which appeal can be taken. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A settlement is not conclusive, either on the parties or on the Court making it. It is not conclusive in any other court, but is only prima facie evidence, subject to be surcharged and falsified. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

Exceptions to settlement—When written exceptions to a settlement are regularly tried upon their merits by the county court, and that court enters a judgment, an appeal may be prosecuted according to K.S. 978 (23.030). *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

A verbal objection at the time of settlement is not equivalent to the filing of formal written objections. *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

Persons who do not file written exceptions or contest in the county court the validity of charges complained of may have the alleged errors reviewed by a bill in chancery. Scott's Heirs v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnees,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

KRS 25.190 (1066; 1067) 1893, c. 221, Sections 46, 47.

Note: The source of the two 1893 sections was G.S., Ch. 28, Art. XVI, Section 2.

ANNOTATIONS

A confirmation of a settlement is only prima facie evidence, and may be questioned on its merits by a bill in chancery. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808.

Kentucky Statutes Art. 5, Ch. 35; KS Sec. 1067; KS 3858, now KRS 25.175; KRS 25.200 (1067); KRS 28.200; KRS 62.060; KRS 62.070; KRS 287.220; KRS 395.255; KS 3859 now KRS 395.310; KRS 396.140; KRS 413.090; KRS 413.120; KRS 426.035; 44 ALR (2d) pp. 808, 809.

The Fourteenth Amendment of the Constitution of the United States provides:

> "No State Shall Make Or Enforce Any Law Which Shall Abridge The Privileges Or Immunities Of Citizens Of The United States; Nor Shall Any State Deprive Any Person Of Life, Liberty, Or Property, Without Due Process Of Law; Nor Deny To Any Person Within Its Jurisdiction The Equal Protection Of The Laws."

Rule 15 of the Federal Rules of Civil Procedure is set forth in the Appendix A hereto, at page —, also set forth in Appendix A hereto, are photo copies of the Statutes of Kentucky and law citations which apply to the within action, and governing the duties imposed upon administrators in the handling of Estates in Kentucky, and the Final Settlement of the Accounts of an administrator of an Estate in Kentucky.

STATEMENT OF THE CASE

This action was commenced on September 13, 1956, in the Jefferson Circuit Court, Chancery Branch, First Division, at Louisville, Kentucky, by the filing of the Complaint by the Plaintiffs Respondents, The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company (formerly the Fidelity & Columbia Trust Company) the Joint administrators, with the Will Annexed of the estate of John A. O'Brien, deceased. This action was removed to the United States District Court for the Western District of Kentucky at Louisville on October 2, 1956, on a Petition for Removal filed by the Defendant-Petitioner, Mrs. Patricia O'Brien-Smith, who is the widow of the decedent John A. O'Brien, who died on January 1, 1934. See Petition for Removal it is printed in Appendix B hereto, R. Vol. 1 pages 2a-12a, Printed Transcript of Record.

This action is the third settlement suit filed by the Plaintiff-Respondents the Joint administrators in the estate of John A. O'Brien, deceased, and against Mrs. Patricia R. O'Brien-Smith, in the Courts of Kentucky since 1937. The "Plaintiffs-Respondents Motion For Summary Judgments," was granted on November 9, 1962 by the District Court, (Judge W. Wallace Kent) without having a trial of the issues in this action.

Mrs. Patricia R. Smith, the Defendant-Petitioner in the within action, was formerly the wife of John Anthony O'Brien. Before their marriage she was Miss Ivy Patricia Rutherford. She met John A. O'Brien when she was a student at the Louisville Conservatory of Music, in Louisville, Kentucky, and he was a student at the Georgetown University in Washington, D. C. After four years of courtship, they were married on October 1, 1925, at Georgetown University, in Trinity Parish.

According to the Rite of the Roman Catholic Church, and in conformity with the laws of the District of Columbia, Reverend Vincent S. McDonough S.J., officiating, in the presence of a large number of guests including Charles Daley, Jr., and Dorothy Cassell, who were two of the witnesses, as appears from the marriage Register of the Holy Trinity Church, Georgetown, D. C. See Mrs. Smith's Exhibits No. 2, 2a and 2b, Appendix B hereto 495a-497a, Vol. No. 1, Printed Transcript of Record.

Patricia Rutherford and John A. O'Brien were married with the full consent and approval of both Mr. and Mrs. Edward J. O'Brien, Senior, the mother and father of John A. O'Brien, who were both present at their marriage, in Washington, D. C., as shown by the picture of Mr. and Mrs. John A. O'Brien, and Edward J. O'Brien, Senior, taken the next day after their marriage and filed in the within action on August 28, 1959. The said picture was made in Baltimore, Maryland, in the office of and by E. Lucas Girardville, French Regie Director in the United States. See Mrs. Smith's Exhibit No. 2c, Appendix B hereto, R. Vol. 1, pp. 498a-499a.

Two years and five weeks after the marriage of Patricia Rutherford and John A. O'Brien, on November 8, 1927, their first child was born, and at the request of Edward J. O'Brien, Senior, grandfather of the child, the child was christened Edwina Jane O'Brien. See Birth Certificate, Mrs. Smith's Exhibit No. 3, Appendix B hereto, R. Vol. 1 page 502a.

John A. O'Brien was a tobacco broker and was actively engaged in his business up until about seven months before his death. For nearly ten years John was in charge of all the tobacco buyers of Edward J. O'Brien & Company. His picture taken on Easter Sunday 1933, eight months before his death, in front of his home at 1045 Alta Vista

Road, in Cherokee Park, at Louisville, Kentucky, will be found on page 501a, Mrs. Smith's Exhibit No. 2d, Appendix B. R. Vol. 1.

John A. O'Brien died on January 1, 1934. The cause of his death was Enteritis and Tuberculosis, as stated by his two physicians who attended him twice daily before his death, Doctor Samuel A. Overstreet from August 1933, until the time of his death on January 1, 1934, and Doctor Heman Humphrey visited him twice daily with Doctor Overstreet, from October 20, 1933, until the time he died on January 1, 1394. See affidavit of Doctor Heman Humphrey, Mrs. Smith's Exhibit No. 12, R. Vol. 1, pages 630a, 631a, and 631¼a.

1. **The Last Will of John A. O'Brien dated September 22, 1933, Bequeathed All of His Property, Including His Partnership Interest In The Edward J. O'Brien Tobacco Company and its Four Subsidiaries To His Widow, Mrs. Patricia R. O'Brien (now Smith) As Held By The Opinion Of The Court Of Appeals Of Kentucky.**

On September 22, 1933, John A. O'Brien made his last will which was probated on March 1, 1934, in the Jefferson County Court at Louisville, Kentucky, the said will is as follows:

> "I give to my wife, Patricia R. O'Brien, all of the household furniture and all of the personal property of my estate."
>
> (signed) JOHN A. O'BRIEN
> September 22, 1933"
>
> "Witnessed by acknowledgment:
> (signed) DR. HEMAN HUMPHREY
> (signed) L. R. CURTIS"

The two witnesses on John A. O'Brien's last will who were Dr. Heman Humphrey, the family physician, and

L. R. Curtis, who was a Louisville lawyer then, and who is now one of the most prominent Judges of Louisville, Kentucky, stated, without reservation, that John A. O'Brien was fully competent to make a will at the time he acknowledged his last will in their presence, and both Dr. Humphrey and Dr. Overstreet stated that John A. O'Brien was fully able to transact any business up to the day before he died on January 1, 1934. See Mrs. O'Brien-Smith's Exhibit "B", R. Vol. 1, pp. 228a-232a.

By his last will, dated September 22, 1933, John A. O'Brien devised and bequeathed all of the personal property of his estate, including his twenty eight and one third (28-1/3%) per cent interest which he owned at the time of his death in the Edward J. O'Brien Tobacco Company, and its four subsidiaries, the Tobacco Rehandling Company Ltd., Inc., H. N. Martin Leaf Tobacco Company, Standard Storage Company and Western Tobacco Company, to his widow Patricia R. O'Brien (now Smith), who was the sole beneficiary of his last will, and the sole beneficiary of his entire estate, and that her partnership interest in Edward J. O'Brien & Company was personal property of John A. O'Brien's estate, WAS SO HELD BY THE OPINION OF THE COURT OF APPEALS OF KENTUCKY, IN THE FIRST OPINION RENDERED IN THE "RESCISSION SUIT" which was against the O'Brien brothers only. See Mrs. O'Brien's Exhibit 52, R. Vol. 2, page 1896a.

2. The Law Firm of Bruce and Bullitt (now the Law Firm of Bullitt, Dawson and Tarrant), Represented Mrs. O'Brien-Smith, from January 1934, to February 11, 1936, and Five Other Clients whose interests were in Conflict With The Interests of Mrs. O'Brien-Smith, Thus Receiving Five Separate Law Fees.

After the death of John A. O'Brien, Mrs. Patricia O'Brien (now Smith), employed William Marshall Bullitt,

of the law firm of Bruce and Bullitt, now the law firm of Bullitt, Dawson and Tarrant, to represent her in the final settlement of the estate of her deceased husband John A. O'Brien, and to collect the Life Insurance left by him that was made payable to her, in the sum of two hundred one thousand ($201,000.00) dollars. Bullitt agreed to represent her in the final settlement of the said estate, and to collect the Life Insurance, but he only represented her until February 11, 1936. When Mrs. O'Brien-Smith employed William Marshall Bullitt, he did not disclose to her that he was representing five (5) clients who had conflicting interests with her interests, namely:

(1) that he and his law firm had represented the brothers of John A. O'Brien and the Edward J. O'Brien Tobacco Company for years, and that the Edward J. O'Brien Tobacco Company were borrowers of large sums of money each year from his bank The Citizens Fidelity Bank and Trust Company,

(2) that he and his law firm was representing the Equitable Life Assurance Society of the United States,

(3) that he and his law firm was representing the Massachusetts Mutual Life Insurance Company,

(4) that he and his law firm was representing the Minnesota Mutual Life Insurance Company,

(5) that he and his law firm was representing The Fidelity and Columbia Trust Company (now Citizens Fidelity Bank & Trust Company),

(6) that he and his family owned over fifty one (51%) per cent of the entire Fidelity & Columbia Trust Company, which is now the Citizens Fidelity Bank and Trust Company,

which is one of the Plaintiffs-Appellees in the within action, making a total of six (6) conflicts of interest with the interests of Mrs. O'Brien-Smith, and five (5) separate law fees for William Marshall Bullitt, and his law firm of Bruce &

Bullitt, which is now the law firm of Bullitt, Dawson & Tarrant, who now represent The Louisville Trust Company and the Citizens Fidelity Bank and Trust Company the Joint Administrators of the Estate of John A. O'Brien, deceased, the Plaintiffs-Appellees in the within case, against Mrs. Patricia R. O'Brien-Smith, and they have kept the estate of John A. O'Brien, deceased, in constant litigation since 1937, for the Joint Administrators, and filed and caused to be filed, every kind of a law suit ever known to man to keep from filing a final settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court at Louisville, Kentucky, as the Court of Appeals of Kentucky four times ordered them to do.

J. G. McPherson, Vice-President of the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, on behalf of the two Trust Companies the Joint Administrators of the estate of John A. O'Brien, deceased, paid William Marshall Bullitt, and his law firm of Bruce and Bullitt, now Bullitt, Dawson and Tarrant, twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33), at eleven o'clock at night on February 11, 1936, from the money in the said estate. After Bullitt was paid, he refused to represent Mrs. O'Brien-Smith. The said amount of attorneys fees was not paid on Mrs. O'Brien's order, but over her protest. The paper signed by Mrs. O'Brien-Smith on February 11, 1936 at twelve o'clock at night approving the payments, was signed by her because J. G. McPherson, Vice-President of Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, told her if she did not sign the paper approving the payments of the lawyers fees, that she would not get a cent of the money that they had received for her partnership interest which the Joint Administrators had sold, and for which they received the payment. See Defendant-Appellant Mrs. O'Brien-Smith's

Exhibits No. 66 and 67, pages 1951a and 1952a, Volume 2, Printed Transcript of Record. On page 24, of the Joint Administrators' complaint, which is now page 41a, Volume 1, of the Printed Transcript of Record, they admit that the Joint Administrators paid the law firm of Bruce and Bullitt, twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33). On page 4 of the complaint, which is now page 19a, Volume 1, of the Printed Transcript of Record, they contradict themselves and state that the said amount was paid to Leo T. Wolford, just one of the lawyers in the law firm of Bruce and Bullitt. See complaint R. Vol. 1, pp. 41a and 19a.

Further in the Joint Administrators' Exhibit No. 1 to their complaint page 82a, Volume 1, Printed Transcript of Record, they state that the twenty three thousand three hundred thirty three dollars and thirty three cents ($23,-333.33) attorneys' fees were paid to Bruce and Bullitt for the services performed by the attorneys on behalf of Patricia R. Smith, but they contradicted themselves and under oath swore to an affidavit filed with the State Tax Commissioner of Kentucky, that the above amount of attorneys' fees was for representing the Joint Administrators of the O'Brien estate. See Mrs. O'Brien-Smith's Exhibit No. 17, R. Vol. 1, pp. 635a-636a.

The Joint Administrators further swore under oath, to the Commissioner of Internal Revenue, Treasury Department, Washington, D. C., that they had paid the above amount of attorneys' fees for a final settlement of the estate of John A. O'Brien. See Mrs. O'Brien-Smith's Exhibits No. 18 and 19, R. Vol. 1, pp. 637a-642a.

It is clear to be seen that the Joint Administrators so called final settlement of the Estate of John A. O'Brien, which was filed as their Exhibit No. 1, to their complaint, is replete with factual inaccuracies and distortions, and no

reliance or dependence can be put on anything they have stated therein.

From January 1934, to February 13, 1936, no law suits had ever been filed in the said estate, nor had William Marshall Bullitt or the law firm of Bruce and Bullitt, or any member thereof, ever prepared or signed any pleadings or papers of any kind or description, on behalf of Patricia O'Brien-Smith, or the Estate of John A. O'Brien, deceased.

After William Marshall Bullitt, and his law firm of Bruce and Bullitt, were paid the above amount of attorneys' fees, they refused to represent Mrs. O'Brien-Smith, any further, or to require The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, the Joint Administrators, to file a final settlement of the O'Brien estate in the Jefferson County Court at Louisville, Kentucky.

The Joint Administrators were fourteen (14) years in default of their statutory duties, when they filed a partial settlement of the John A. O'Brien estate on June 21, 1950, in the Jefferson County Court, at Louisville, Kentucky. The final settlement of the Estate of John A. O'Brien was due to be filed on March 1, 1936, and to this day it has not been filed, and they have not stated any reasons why it was not filed other than continuous and incessant litigation.

William Marshall Bullitt, and his law firm of Bruce and Bullitt, after February 13, 1936, openly represented the Plaintiffs-Appellees, the Joint Administrators The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, against the interest of the John A. O'Brien estate, and Mrs. O'Brien-Smith, the sole beneficiary of the said estate, as was held by the Court of Appeals of Kentucky, in the Rescission Suit which was against the O'Brien brothers only. See Mrs. O'Brien-Smith's Exhibit No. 52, R. Vol. 2, page 1896a.

William Marshall Bullitt, changed the name of his law firm twice, after 1936, first to Bullitt, Middleton & Seelbach, then to Bullitt, Dawson and Tarrant. Each time he changed the name of his law firm, he wanted a separate law fee from the O'Brien estate, and he has been awarded two separate attorneys fees by the Summary Judgments of the District Court, of November 9, 1962, in the within action, twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33), and thirty five thousand dollars ($35,000.00) with six per cent (6%) interest on the thirty five thousand dollars ($35,000.00) from March 5, 1952 to November 9, 1962 which amounts to twenty one thousand dollars ($21,000.00) making a total of seventy nine thousand three hundred thirty three dollars and thirty three cents ($79,333.33), awarded to the Bullitt, Dawson and Tarrant law firm by the Summary Judgments of the District Court of November 9, 1962.

3. The Louisville Trust Company And The Citizens Fidelity Bank And Trust Company Executed Bonds In The Amount Of $100,000.00 Each, When They Were Appointed As Joint Administrators Of The Estate of John A. O'Brien, And Agreed To Act As Such For One And One Half (1½) Per Cent Of The Total Assets Of The Estate.

At the suggestion and insistence of William Marshall Bullitt, who was representing Mrs. O'Brien-Smith at the time, she requested that the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, be appointed as one of the Joint Administrators of the estate of John A. O'Brien, and she made the request and they were appointed with The Louisville Trust Company as Joint Administrators of the estate of John A. O'Brien, deceased, on March 1, 1934, and executed Bonds in the amount of one hundred thousand ($100,000.00) dollars each. When they qualified as Joint Administrators of the

said estate, they both agreed to "faithfully perform and discharge all the duties of the aforesaid trust; in default of which we (The Trust Companys) will pay all the damages that may be sustained." See Mrs. Smith's Exhibits No. 20 and 21, R. Vol. 1 pp. 643a-652a.

At the time of his death, John A. O'Brien was one of the four owners of the Edward J. O'Brien Tobacco Company and its four subsidiaries, and Mrs. O'Brien-Smith inherited his entire interest in the said Company and its four subsidiaries as so held by the Court of Appeals of Kentucky, in its Opinion in the Rescission Suit, Mrs. Smith's Exhibit No. 52, R. Vol. 2, page 1896a.

4. The tobacco business known as Edward J. O'Brien & Company of Louisville, Kentucky, was originally established by Edward J. O'Brien, Senior, in 1880. It steadily grew in volume, extent of operations and profit, until it became one of the largest, if not the largest, independent tobacco brokers and dealers in the world. In 1915, Edward J. O'Brien, Senior, turned over all of the assets, including good will, of the business to a copartnership and took his eldest son, Edwin J. O'Brien, sometimes referred to as Edwin J. O'Brien, Jr., into the partnership. In 1919 the partnership admitted additional members, including Elizabeth Graves O'Brien, wife of Edward J. O'Brien, Senior, and James G. O'Brien, Joseph B. O'Brien, and John A. O'Brien, sons of Edward J. O'Brien, Senior, and Marie O'Brien Michael his daughter. Their respective interests at that time were as follows:

Mrs. Elizabeth Graves O'Brien	15%
James G. O'Brien	12%
Joseph B. O'Brien	12%
John A. O'Brien	12%
Marie O'Brien Michael	12%
Edward J. O'Brien, Sr.	25%

The partnership continued without interruption in the lucrative business of redrying and rehandling and dealing in tobacco, with its principal place of business in Louisville and branches in other States and foreign countries. In 1928, Edward J. O'Brien, Senior, died, leaving by will all of his 25% interest in the partnership to his five children, Edwin J. O'Brien, Jr., Joseph B. O'Brien, James G. O'Brien, John A. O'Brien and Marie O'Brien Michael. Thereupon, on May 29, 1928, all the surviving partners entered into Articles of Copartnership and continued the business without interruption. Later, in December, 1928, Marie O'Brien Michael withdrew from the partnership, leaving the mother and the four sons remaining. On January 23, 1931, Amended Articles of Copartnership (see Defendant-Appellant Mrs. Smith's Exhibit No. 25, pages 663a-669a, Volume 1, Printed Transcript of Record), were executed, whereby the business was continued by the mother, Elizabeth Graves O'Brien, and the four sons, Edwin J. O'Brien, Junior, James G. O'Brien, Joseph B. O'Brien, and John A. O'Brien, with each owning the following interest in the entire company, including the subsidiaries:

Elizabeth Graves O'Brien	15.00%
Edwin J. O'Brien, Jr.	21.25%
James G. O'Brien	21.25%
Joseph B. O'Brien	21.25%
John A. O'Brien	21.25%

5. The partnership agreement of January 23, 1931, contains several pertinent provisions, among which are the following.

> Article 2. The said parties and the survivors of them will continue to remain under the firm name of E. J. O'Brien & Company, for the term of Fifty (50) years from this date, if they or any two of them shall so long live, subject nevertheless to determination as hereinafter provided.

Article 5. The death of any partner hereto shall not terminate the partnership.

Article 6. In the event of the death of any partner his or her interest shall remain in said partnership until Five (5) years after such occurs, and in the event the surviving partners, before the expiration of Five (5) years, elect to admit the representative of said estate to membership, then papers shall be drawn in accordance with this Agreement and the terms at that time agreed upon, but until the admission of such representative to the firm, the estate, or its representative, shall be silent partner only and shall not be entitled to participate in the management and the personal representative shall accept statements rendered by the partnership as final and conclusive. In the event the estate elects to withdraw from the partnership at the expiration of Five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the Company, or by appraisement, plus profits and interest if any.

Article 23. These Articles may be amended at any time by the parties hereto and in the event of the death of a partner or such partner becoming incompetent or insolvent, the remaining partners may make such amendments, and the partnership may be terminated at any time by unanimous consent of all parties entitled to participate in the partnership or may with such consent be changed from a partnership to a corporation.

From January 1, 1931, to November 30, 1935, Edwin J. O'Brien, Jr., withdrew the total amount of the capital of which he had in the Edward J. O'Brien and Company and its four (4) subsidiaries and overdrew in the sum of one hundred forty four thousand dollars ($144,000.00), and he did not account for, or pay any interest on his overdraft to the O'Brien Company or to the Estate of John A. O'Brien, deceased. The estates proportionate part of the interest on

the overdraft amounted to thirty six thousand four hundred eighty six dollars and ninety seven cents ($36,486.97).

6. So instead, of Mrs. O'Brien-Smith just owning twenty one and one-fourth per cent (21¼%) interest of the capital in the O'Brien Company and its four (4) subsidiaries, as stated to her by J. G. McPherson and George D. Caldwell, Vice-Presidents of the two Trust Companys, the Joint Administrators, she actually owned twenty eight and one-third per cent (28 1/3%) of all the capital in the O'Brien Company and its four (4) susidiaries.

Edward J. O'Brien & Company not only owned and operated tobacco warehouses, redrying and rehandling plants in Louisville, but also operated large redrying and rehandling plants and tobacco warehouses at Lexington, Kentucky; Clarksville, Tennessee; Springfield, Tennessee; Wilson, North Carolina; Louisville, Kentucky; and Shelbyville, Kentucky, as well as a warehouse and office at Baltimore, Maryland; and Liverpool, England. See Mrs. Smith's Exhibits No. 45, 46 and 46a, R. Vol. 2 pp. 1859a-1872a. Edward J. O'Brien & Company owned and operated certain wholly owned subsidiaries through which it did a large part of its tobacco business. These subsidiares were known as:

1. H. N. Martin Leaf Tobacco Co.
2. The Tobacco Rehandling Co., Ltd. Inc.
3. Western Tobacco Co.
4. Standard Storage Co.

In addition to its United States business, Edward J. O'Brien & Company had large foreign contracts with several foreign countries, including a contract with the Government of France which had been a large customer, and had produced a lucrative business for about forty years. The tobacco business of Edward J. O'Brien & Company had been a steady and stable business, not affected by the de-

pression or the death of the senior partner and founder of the business, Edward J. O'Brien, Senior, but continued at a substantial profit year in and year out.

John A. O'Brien was the youngest son. He was taken into the partnership in 1919 with a full 12% interst in the Company, and after learning the business under the apprenticeship of his father, became a tobacco buyer in 1922. As such he was engaged in buying tobacco for the firm's account at various places, including Georgia, North Carolina, South Carolina, Tennessee and Kentucky. For nearly ten years John was in charge of all buyers of Edward J. O'Brien & Company.

7. There Was No Endorsement Of An Insurance Trust Agreement, Changing The Beneficiary Of The Two Hundred One Thousand ($201,000.00) Dollars Of Life Insurance From Mrs. O'Brien To Any Of The O'Brien Family On Any Of The Life Insurance Policies Left By John A. O'Brien, Payable To His Widow Ivy Patricia R. O'Brien (now Smith).

John A. O'Brien had two hundred one thousand ($201,000.00) dollars in policies of life insurance which he had taken out in 1926, 1928 and 1932, and upon which the premiums had been paid in full out of his own funds, payable to his widow Ivy Patricia R. O'Brien. There was one Life Insurance policy for fifty thousand ($50,000.00) dollars in the Equitable Life Assurance Society, upon which his wife, Ivy Patricia R. O'Brien, was the sole beneficiary. See Mrs. Smith's Exhibit No. 5, R. Vol. 1, pp. 503a-515a. There were four Life Insurance policies, totaling fifty one thousand ($51,000.00) dollars in the Minnesota Mutual Life Insurance Company, upon which his wife, Patricia R. O'Brien, was likewise the sole beneficiary. See Defendant-Appellant Mrs. Smith's Exhibits No. 9, 10, 11 and 12, pages 565a-

631½a, Volume 1, Printed Transcript of Record. There were three Life Insurance policies totaling one hundred thousand (100,000.00) dollars in the Massachusetts Mutual Life Insurance Company, upon which his wife, Patricia R. O'Brien, was the sole beneficiary as to one policy for fifty thousand ($50,000.00) dollars and was the beneficiary for life with remainder to surviving children, with remainder to the survivors of John's mother, brothers and sister, as to the other two policies for fifteen thousand ($15,000.00) dollars and thirty five thousand ($35,000.00) dollars, respectively, totaling fifty thousand ($50,000.00) dollars. See Mrs. Smith's Exhibits No. 6, 7 and 8, R. Vol. 1, pp. 516a-565a.

Immediately after the death of John A. O'Brien, George D. Caldwell, Vice-President of the Louisville Trust Company, one of the Joint Administrators of the said estate, and one of the Plaintiffs-Appellees in the within action, wrote a letter to each of the three above-named Insurance Companies not to pay the insurance to Mrs. O'Brien-Smith, claiming that The Louisville Trust Company had a so-called Insurance Trust Agreement which gave all of the two hundred one thousand ($201,000.00) dollars of Life Insurance as set out herein, to the three brothers of John A. O'Brien, deceased.

Thereafter, Patricia O'Brien-Smith, never received anything on the policies with the Minnesota Mutual Life Insurance Company or Massachusetts Mutual Life Insurance Company, until more than two years later, viz., after February 11, 1936, the date that her partnership interest was sold by The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company the Joint Administrators of the O'Brien estate, purportedly to James G. O'Brien. To George D. Caldwell's letter claiming John's insurance under the so-called insurance trust agreement, the Massachusetts Mutual Life Insurance Company made immediate

reply on January 29, 1934. See Mrs. Smith's Exhibit No. 15, R. Vol. 1, pp. 634a-635a. The said letter is as follows:

"MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

SPRINGFIELD, MASSACHUSETTS

January 29, 1934

Wesley E. Monk
General Counsel

John F. Handy
Associate Counsel
The Louisville Trust Company,
Mr. George D. Caldwell, Vice-President,
Louisville, Ky.

Re: Policies Nos. 839641 - 841255 - 896601 —
John A. O'Brien

Dear Sir:

Your letter of January 25, 1934, addressed to our Louisville agency, has been referred to this department for attention.

In view of the demand made in your letter, we will withhold any further payments under these policies. However, at no time during the life of these policies was there ever any indication that the Louisville Trust Company was named as trustee nor was this Company put on notice thereof nor were the conditions and provisions set forth in the contracts ever complied with in so far as any change of beneficiary was concerned.

According to our records, this insurance is payable to Patricia R. O'Brien, widow of the decedent, under certain installment option settlements which were set up by the insured for her benefit, and we will, accordingly, await further developments.

We construe your letter as making a demand upon us for payment and unless this matter is adjusted

within a very short time it will be necessary for us to interplead the respective claimants to this fund.

Yours very truly,
(signed) JOHN F. HANDY,
Associate Counsel."

JFH-B

Likewise the Equitable Life Assurance Society replied by letter on February 2, 1934, to George D. Caldwell's letter of demand, (see Mrs. Smith's Exhibit No. 13, R. Vol. 1, page 632a.) said letter is as follows:

"THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

393 Seventh Ave. New York
Thomas I. Parkinson, President

February 2, 1934

Walter G. Schelker
Assistant Secretary
Louisville Trust Company,
Louisville, Kentucky

Attention: Mr. George D. Caldwell
Vice-President and Trust Officer
Re: Policy No. 8870,524—John A. O'Brien

Gentlemen:

Your letter of January 25 addressed to our representative in Louisville, Kentucky, has been referred to this office for attention.

We find that Ivy P. O'Brien, wife of John A. O'Brien, the insured under Policy No. 8870,524 was designated as the beneficiary to receive the amount due at the death of the insured and that the beneficiary was never changed. Accordingly, the face of the policy was paid to this beneficiary after the death of the insured, in accordance with the terms and conditions of the contract.

Yours very truly,
(signed) W. G. SCHELKER,
Assistant Secretary."

LDF:LMT

With the Minnesota Mutual Life Insurance Company's reply to George D. Caldwell's letter, they enclosed copies of the changes of beneficiary dated December 29, 1933, changing the beneficiary clause, WHEREBY JOHN A. O'BRIEN MADE PATRICIA R. O'BRIEN, (NOW SMITH) SOLE BENEFICIARY WITHOUT REMAINDER, OVER TO ANYONE AND MAKING SUCH CHANGE IRREVOCABLE. See Mrs. Smith's Exhibit No. 9, R. Vol. 1, pages 567a, 568a, 575a; Defendant's Exhibit No. 10, pages 578a, 579a, 591a; Defendant's Exhibit No. 11, pages 594a, 595a, 605a; and Defendant's Exhibit No. 12, pages 609a, 610a, 625a.

On the advice of their attorney William Marshall Bullitt, of the law firm of Bruce and Bullitt, (now Bullitt, Dawson and Tarrant law firm), two of the insurance companies as set forth herein, the Massachusetts Mutual Life Insurance Company who carried one hundred thousand ($100,000.00) dollars worth of Life Insurance payable to Mrs. O'Brien-Smith, and The Minnesota Mutual Life Insurance Company, who carried the fifty one thousand ($51,000.00) dollars Life Insurance payable to Mrs. O'Brien-Smith, refused to pay the Life Insurance to Mrs. O'Brien-Smith, until after Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company and its four (4) subsidiaries, was sold over her protest by the Joint Administrators, sometime in 1935, for three hundred eighty thousand ($380,000.00) dollars, purportedly to James G. O'Brien, one of the brothers of John A. O'Brien.

8. There Was Never Any Dispute Of Any Kind Or Description Between Patricia R. O'Brien (Smith) And The Members Of The Family Of John A. O'Brien, After His Death.

There was never any dispute of any kind or description between Patricia O'Brien-Smith and the members of

the family of John A. O'Brien, deceased, after his death. There was no dispute as to the validity of the testamentary instruments found after the death of John A. O'Brien; there was no dispute as to the value of his interest in the Edward J. O'Brien Company; there was no dispute as to the effectiveness of an insurance trust agreement; or any other matters. Patricia O'Brien Smith never spoke to any of the members of the family of John A. O'Brien, deceased, after the death of her husband. Mrs. O'Brien-Smith acted on the advice of J. G. McPherson, Vice-President of the Citizens Fidelity Bank & Trust Company, and her attorney, William Marshall Bullitt, who told her not to speak to, or talk to any member of the family of her husband John A. O'Brien. All that she knew of any contentions that any member of the O'Brien family might have made was through J. G. McPherson, and George D. Caldwell, the Vice-Presidents of the two Trust Company Joint Administrators, and William Marshall Bullitt, who owned the controlling interest in the Citizens Fidelity Bank & Trust Company.

9. The Sale Of Mrs. Patricia O'Brien-Smith's Partnership Interest In Edward J. O'Brien & Company And Its Four Subsidiaries By The Two Trust Companies' Joint Administrators In Violation Of The Terms Of The Partnership Agreement, And For Less Than One Third Of The Market Value.

One of the main issues in this action, raised by the complaint of the Plaintiffs-Appellees, and by their "Account and Final Settlement of The Execution of Their Trust," of the accounts of John A. O'Brien's estate, which is their so-called final settlement of the O'Brien estate, Plaintiffs-Appellees Exhibit No. 1, is the value of the interest owned, by Mrs. Patricia R. O'Brien (now Smith) in the family partnership of Edward J. O'Brien Tobacco Company and its four subsidiaries namely:

1. The Tobacco Rehandling Company, Ltd., Incorporated, whose main office is in London, England,
2. The H. N. Martin Leaf Tobacco Company,
3. The Standard Storage Company, and
4. The Western Tobacco Company,

whose main offices as heretofore stated are all located in Louisville, Kentucky, except one of the subsidiaries, The Tobacco Rehandling Company Limited Incorporated, and its main office and plant are in London, England. The O'Brien Company has offices and redrying plants in Lexington, Kentucky; Clarksville, Tennessee; Kinston, North Carolina; Wilson, North Carolina; Shelbyville, Kentucky; and Louisville, Kentucky, and are known to be the largest independent tobacco brokers in the world.

During the year of 1935, the Plaintiffs-Appellees, The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company (formerly Fidelity and Columbia Trust Company), the Joint Administrators of the Estate of John A. O'Brien, deceased, sold Mrs. Patricia O'Brien-Smith's partnership interest, in the Edward J. O'Brien & Company and its four subsidiaries, purportedly to James G. O'Brien, one of the brothers of John A. O'Brien, deceased, for three hundred eighty thousand ($380,000.00) dollars. Of this amount, the Trust Companies the Joint Administrators, retained one hundred thousand ($100,000.00) dollars. The Federal Estate Taxes had already been paid, before the Trust Companies retained the above amount.

The Plaintiffs-Appellees, the Joint Administrators of the estate of John A. O'Brien, deceased, sold Mrs. Patricia O'Brien-Smith's partnership interest, in two years after the death of her husband, John A. O'Brien, and required the partners in the O'Brien Company, to only pay one year's profits of the O'Brien Company and its four subsidiaries, to the Estate, in violation of the terms of the partnership agreement, and without an order or approval

of any Court, disregarding the partnership agreement between John A. O'Brien and the other partners of Edward J. O'Brien & Company, dated January 23, 1931, and its provisions as set forth therein. See Mrs. O'Brien-Smith's Exhibit No. 25. R. Vol. 1, pp. 663a-669a.

In 1935, the Joint Administrators of the estate of John A. O'Brien, deceased, started talking to Mrs. O'Brien-Smith, about selling her partnership interest which she inherited from her husband in Edward J. O'Brien & Company and its four subsidiaries; they gave her a piece of paper, consisting of fifteen lines, upon which to sell her interest. See Mrs. Smith's Exhibit No. 53, R. Vol. 2, page 1920a, which is as follows:

"DEFENDANT MRS. O'BRIEN-SMITH'S EXHIBIT No. 53

A Sheet Of Paper Given To Mrs. Patricia O'Brien-Smith, With Fifteen (15) Lines Of Figures Typed Thereon, And Starts With Present Interest In Edward J. O'Brien Tobacco Company (And Its Four Subsidiaries).

Present Interest		$425,649.45
Real Estate	$331,873.95	
Pro Rata based on capital	23.77%	78,886.44
		346,763.01
Her 1/3 Life Interest Real Estate— 23¼% of 78,886.44		18,341.10
		365,104.11
Depreciate wholly owned subsidiaries—50% 252,500 at 50%—126,250 at 23.77%		30,009.62
		$335,094.49
Remainder Interest in $50,000 Life Ins.		17,500.00
		$317,594.49
½		$158,797.25"

1. The Joint Administrators of John A. O'Brien's estate told Mrs. O'Brien-Smith, that the market value of the partnership interest owned by John A. O'Brien at the time of his death, in the Edward J. O'Brien & Company and its four subsidiaries, was $425,649.45 and after deductions which the O'Brien brothers could make, it ended up with the figure of One Hundred Fifty Eight Thousand Seven Hundred Ninety Seven Dollars and Seventy Five Cents ($158,797.75) and,

2. That the real estate, property, redrying plants, and equipment owned by the Edward J. O'Brien & Company, had a market value of Three Hundred Thirty One Thousand Eight Hundred Seventy Three Dollars and Ninety Five Cents ($331,873.95) and,

3. That the interest owned by John A. O'Brien, at the time of his death, in the real estate, property, plants and equipment in Edward J. O'Brien & Company and its four subsidiaries, was not personal property of John A. O'Brien's estate, and that there must be deducted therefrom, the total of the value of John A. O'Brien's interest in all the real estate, property, plants and equipment and that it amounted to Seventy Eight Thousand Eight Hundred Eighty Six Dollars and Forty Four Cents ($78,886.44), because John A. O'Brien's capital in Edward J. O'Brien & Company and its four subsidiaries, was twenty three and seventy seven one hundredths per cent (23.77%) of the whole, therefore, there must be deducted Seventy Eight Thousand Eight Hundred Eighty Six Dollars and Forty Four Cents ($78,886.44), from the market value of the real estate, leaving a balance of Three Hundred Forty Six Thousand Seven Hundred Sixty Three Dollars and One Cent ($346,763.01) and,

4. That Mrs. O'Brien-Smith, had only a widow's dower interest of one third (1/3) life interest in the real estate,

property, plant and equipment, owned by John A. O'Brien in the Edward J. O'Brien & Company, which she inherited, and that there should be deducted twenty three and one fourth (23¼%) per cent of the Seventy Eight Thousand Eight Hundred Eighty Six Dollars and Forty Four Cents ($78,886.44) in the amount of Eighteen Thousand Three Hundred Forty One Dollars and Ten Cents ($18,341.10), leaving the amount of Three Hundred Sixty Five Thousand One Hundred Four Dollars and Eleven Cents ($365,-104.11) and,

5. That the four (4) wholly owned subsidiaries of the Edward J. O'Brien Tobacco Company, should be depreciated fifty (50%) per cent. That the wholly owned subsidiaries were carried on the books of Edward J. O'Brien & Company at a book value of Two Hundred Fifty Two Thousand Five Hundred ($252,500.00) Dollars, but that the subsidiaries should be depreciated fifty (50%) per cent of the book value, to arrive at the market value, leaving a balance of One Hundred Twenty Six Thousand Two Hundred Fifty ($126,250.00) Dollars. That John A. O'Brien owned twenty three and seventy seven one hundredths (23.77%) per cent, of the subsidiaries, therefore, there should be deducted from the value of the subsidiaries for Mrs. O'Brien-Smith's part, Thirty Thousand Nine Dollars and Sixty Two Cents ($30,009.62), leaving a balance of Three Hundred Thirty Five Thousand Ninety Four Dollars and Forty Nine Cents ($335,094.49) and,

6. That the three brothers of John A. O'Brien, deceased, were entitled to a remainder interest in Fifty Thousand ($50,000.00) Dollars of two of the Life Insurance policies of the Massachusetts Mutual Life Insurance left by John A. O'Brien, payable to his widow, Mrs. Patricia O'Brien-Smith, so, for the three brothers of John A. O'Brien, the Joint Administrators deducted Seventeen

Thousand Five Hundred ($17,500.00) Dollars from Mrs. O'Brien-Smith's interest in the partnership, leaving a balance of Three Hundred Seventeen Thousand Five Hundred Ninety Four Dollars and Forty Nine Cents ($317,594.49) and,

7. The Joint Administrators then told Mrs. O'Brien-Smith, that she did not inherit any interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries, under the last will of John A. O'Brien, deceased, and that she would only get what the Kentucky law provided, in the event there is no will, stating that she would only get one half of the value of John A. O'Brien's partnership interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries, and they deducted one half thereof, leaving a balance of One Hundred Fifty Eight Thousand Seven Hundred Ninety Seven Dollars and Twenty Five Cents ($158,797.25), see Mrs. Smith's Exhibit No. 53, R. Vol. 2, page 1920a.

Patricia O'Brien-Smith told J. G. McPherson, and George D. Caldwell, the Trust Officers of the two Trust Companies, the Joint Administrators of John A. O'Brien's estate, and their attorney William Marshall Bullitt, that she did not want to sell her partnership interest in the Edward J. O'Brien & Company for any price, until the end of five (5) years which she was told was provided by the partnership agreement, Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 25, pages 663a-669a, Volume 1, Printed Transcript of Record. She told them that she did not want to mix the insurance matter with John A. O'Brien's estate, but was only interested in getting her insurance money.

8. The Joint Administrators told Mrs. O'Brien-Smith that the O'Brien brothers would not release their claims under a so-called Insurance Trust Agreement under which they were claiming the Two Hundred One Thousand

($201,000.00) Dollars of Life Insurance that was made payable to Patricia O'Brien-Smith, unless Patricia O'Brien-Smith would sell out her interest in the Edward J. O'Brien & Company.

9. The officers of the Trust Companies further told her that unless she sold her interest in the Edward J. O'Brien & Company at the figure set by the O'Brien brothers, that they would incorporate the company and freeze out her husband's interest so that it would not be worth One Hundred Thousand ($100,000.00) Dollars.

10. J. G. McPherson and George D. Caldwell told Mrs. O'Brien-Smith that John A. O'Brien's interest in the partnership of Edward J. O'Brien & Company would be as liable in the loss as Edwin J. O'Brien, Jr. would be in the law suit filed against him and the other Directors of the National Bank of Kentucky, filed in 1929.

11. J. G. McPherson and George D. Caldwell further said that neither John A. O'Brien's will of September 22, 1933, or the will of July 7, 1933, gave her any part of the interest in the partnership real estate, and that the last will of John A. O'Brien would be construed as meaning only "personal effects," such as cuff links, shaving brush and similar personal items.

12. J. G. McPherson and George D. Caldwell said that the O'Brien brothers were willing to pay her Three Hundred Fifty Thousand ($350,000.00) Dollars if she would sell the partnership interest right away. After this long conference, Patricia O'Brien-Smith replied that she still did not want to sell her husband's interest in Edward J. O'Brien & Company until the end of five years and she wanted to remain a partner for five years. She said she wanted to have an audit made and she was willing to pay for it. J. G. McPherson and George D. Caldwell both re-

plied that Edwin J. O'Brien, Jr, would not allow them to have an audit made of the O'Brien Company and that they could not force the O'Brien brothers to give her the right to have an audit made of the company.

13. J. G. McPherson and George D. Caldwell said the figures shown on the 1934 audit made by Peat, Marwick, Mitchell & Company, of the Edward J. O'Brien & Company showed the market value of the interest owned by John A. O'Brien, and that was the amount shown on the paper, Defendant-Appellant's Exhibit No. 53. Patricia O'Brien-Smith definitely told J. G. McPherson and George D. Caldwell that she would not sell the partnership interest at any figure.

At that time Patricia O'Brien (now Smith) did not know what a "subsidiary" was, but thought it meant "stocks like Liggett & Myers and Reynolds Tobacco Company, and they wanted to cut them in half because they had gone down." She had never seen an audit, had never done any bookkeeping, typewriting or stenographic work. She did not know what a balance sheet was, nor what a recapitulation of assets and liabilities meant. She did not know what an appraisal was. She did not know the meaning of "good-will" or that it had any connection with business or partnership values. In short, Patricia O'Brien-Smith had no schooling in or knowledge of business matters whatsoever.

After the morning conference with the officers of the Trust Companies, Patricia O'Brien-Smith returned home shortly after noon. She told some of the members of her family that she was being forced to sell her interest in Edward J. O'Brien & Company, and knew nothing about such matters, and asked them what to do. It was suggested that she secure the services of a local auditor, and she called Ernst and Ernst, accountants, on the telephone and

asked them to send an auditor out to her home. Edward C. Wirotzious, one of their employees, came out, and she showed him the 1933, and 1934 audits of Edward J. O'Brien & Company, which had been turned over to her by the officers of the two Trust Companies, the Joint Administrators, and they said they took these two audit reports from the file in their banks. See Mrs. O'Brien-Smith's Exhibit No. 42, R. Vol. 2, pp. 1758a-1807a. Edward Wirotzious spent about two hours looking them over during the afternoon.

When Patricia O'Brien-Smith took Edward C. Wirotzious to the first conference with the Joint Administrators, when they were trying to get her to sell her partnership interest, she introduced Edward C. Wirotzious and told them she had brought him to the conference with her to get permission to have the books of Edward J. O'Brien Tobacco Company audited. They told her that Edwin J. O'Brien, Jr. would never permit an audit to be made of the O'Brien Company. Edward C. Wirotzious attended several conferences with Mrs. O'Brien-Smith, when J. G. McPherson and George D. Caldwell were both present in one of their offices. Edward C. Wirotzious stated to them that he made no attempt whatsoever to ascertain the correct or market value of the partnership interest of John A. O'Brien, deceased, for Patricia O'Brien-Smith, as he was never employed for that purpose. The only reason that he was present at any of the conferences was to obtain permission for the Ernst & Ernst accounting firm to make an audit of Edward J. O'Brien & Company for Patricia O'Brien-Smith. It was explained to both J. G. McPherson and George D. Caldwell that Edward Wirotzious was present only for the purpose of convincing them of the importance of having an audit made and of obtaining their permission to make such an audit of the O'Brien Company. It

was never stated at any time that he was present for the purpose of analyzing any audits or to determine the true market value of the partnership interest which was owned by Patricia O'Brien-Smith. Further, Edward Wirotzious never gave Patricia O'Brien-Smith any advice except to say he could not tell what the value of her husband's interest was in Edward J. O'Brien & Company unless he made an independent audit. Mrs. O'Brien-Smith is fully corroborated in all her statements made in regard to what took place at the conferences and in regards to the negotiations for the sale of her partnership interest by the deposition of Edward C. Wirotzious, consisting of fifty two typewritten pages, each page of which is signed by him and filed in the within action on August 28, 1959, by order of the District Court, with the "Defendant Patricia O'Brien-Smith's Supplemental Affidavit In Opposition to 'Plaintiff's Joint Administrators' Motion for Summary Judgment" and "Second Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim, Filed Herein on November 12, 1956," see Defendant-Petitioner Mrs. O'Brien-Smith's Exhibit No. 35, R. Vol. 1, pp. 1230a-1277a.

There was not any testimony of any kind or description taken or filed in the within action, and there was only one deposition filed in the within action and that was the deposition of Edward C. Wirotzious.

When the deposition of Edward C. Wirotzious was taken by Judge A. D. Kirk, an attorney, on behalf of Patricia O'Brien-Smith, Edward C. Wirotzious was then employed by the United States Treasury Department, Bureau of Internal Revenue, and had been employed by them about a year and a half. Prior to that he had been a senior accountant on the staff of Ernst & Ernst, Public Accountants and Auditors of the Louisville Office, Louisville, Kentucky.

The deposition of Edward C. Wirotzious completely refutes all statements contained on pages 8, 9, 10, 11, 12 and 13, under Paragraphs VII, VIII and IX, of the Joint Administrators' so-called Final Settlement of the Estate of John A. O'Brien (filed as their Exhibit No. 1 to their complaint on September 13, 1956, and shown on pages 61a-67a, Volume 1, Printed Transcript of Record), in regards to the negotiations that the Joint Administrators claimed that Mrs. O'Brien-Smith had with the surviving partners and the O'Brien family.

When Edward C. Wirotzious was questioned by Judge A. D. Kirk, an attorney who was taking his deposition of why he was present at the conferences with Mrs. O'Brien (Smith), J. G. McPherson and George D. Caldwell, before her partnership interest was sold by the Joint Administrators, Edward C. Wirotzious stated in answer to question 22, (pages 1237a, 1238a, Volume 1, Printed Transcript of Record):

> "Q22—If I understand you correctly,—you can say whether or not I am right,—your presence there was that you assumed you would be called on . . . to make an audit of Edward J. O'Brien & Company as an employee of Ernst & Ernst?
>
> A—You are right Judge on that, but my interest all along has been to obtain from the representatives of the O'Brien interest the authority or permission,—I should say instead of authority, permission to make an audit of the O'Brien Company books and records and the books and records of the subsidiary companies for Mrs. O'Brien. In fact, I have never given her any advice whatsoever as to what her interest was or what the value of her interest would be, and I told her then and I am repeating what I said earlier in this deposition, that the only way I could prove or disprove Mr. Richardson's figures would be to make an investigation on my own behalf."

Patricia O'Brien-Smith did not see the 1935 appraisal report of the property, plant and equipment of Edward J. O'Brien & Company or its subsidiaries, nor was such an appraisal report or any appraisal report, present at any of the numerous meetings and conferences.

Likewise, neither Patricia O'Brien-Smith, nor anyone representing her were ever shown or given access to the audit reports for the four subsidiary companies. *George D. Caldwell stated under oath that he never saw any audit reports of any of the subsidiaries at any time nor did he try to get any, and further stated that he never saw any appraisal reports at any time;* and *this was also the statement of J. G. McPherson.* It was not possible from the 1933 and 1934 audit reports of the Edward J. O'Brien Tobacco Company, to determine the proper valuation of the tobacco inventory for the reports valued the inventories "at cost generally which is lower than market with due regard to the various grades," or the market value of the interest owned by Mrs. O'Brien-Smith.

When Edward C. Wirotzious was questioned about what audit reports were shown him he stated that he was shown some audit reports of Edward J. O'Brien & Company but no audit reports of the four subsidiaries was ever shown to him or Mrs. O'Brien-Smith. When asked if he saw any audits for the four subsidiaries, or any appraisals of the property, plant and equipment of Edward J. O'Brien & Company or for the four wholly owned subsidiaries, he replied (pages 1257a, 1258a and 1260a, 1261a, 1262a, Volume 1, of the Printed Transcript of Record):

> "xQ103—And you say at the meeting that night, as you fixed it in early July, you discussed with Mr. Richardson the value of the wholly owned subsidiaries of the Edward J. O'Brien Tobacco Company?
>
> A—That is right.

xQ104—Did you have anything present that night other than the 1933 and 1934 audits of the Edward J. O'Brien Tobacco Company?

A—That was all we brought. Mr. Richardson had some papers with him.

xQ105—Didn't he have with him the audits of the H. N. Martin Leaf Tobacco Company and Tobacco Rehandling Company for 1933 and 1934?

A—No, he didn't.

xQ117—Any appraisals there?

A—No, sir.

xQ125—And you didn't advise Mrs. O'Brien to do it?

A—I didn't give her any advice at all.

xQ126—You were there simply to get a job for Ernst & Ernst to audit the books?

A—That is exactly it.

xQ129—Did you advise Mrs. O'Brien at that time or tell her that the audits did not contain any valuation for good will?

A—It was not discussed. We didn't discuss values at all at that particular time or at any time. As I have stated before in this deposition, I have never advised Mrs. O'Brien as to what,—that is, prior to the time she sold out in November, 1935, what her interest would be, whether it could be increased $150,000.00 or be reduced down to $50,000.00. I never did talk to her about it because I was not in a position to make a statement relative to it."

During July, 1935, there were frequent conferences with her attorney and the Joint Administrators but Patricia O'Brien-Smith. said at the conclusion of the conferences and before she left town for the summer that she did not

want to sell her interest in Edward J. O'Brien & Company at any price for five years and asked the lawyers to push the insurance matter for her.

Patricia O'Brien Smith, had no contact with the matter until the latter part of September, when, after her return to Louisville, a conference was arranged for a couple of days later, about the first of October, at which J. G. McPherson and George D. Caldwell E. C. Wirotzious, F. A. Shonkwiler, Mrs. L. S. Blickenstaff and Patricia O'Brien-Smith were present. J. G. McPherson and George D. Caldwell said the O'Brien brothers had increased their offer to $380,000.00 for the partnership interest if she would sell. Patricia O'Brien-Smith asked what the profits would be for 1935, and J. G. McPherson and George D. Caldwell said there would not be any profits; that the Company had operated at a loss. She asked for an audit for 1935, but they said that an audit had not been made but when it was it would show that the Company had a loss for the year. Patricia O'Brien-Smith told them that she insisted that an audit be made to determine what the interest was worth; that she wanted to hold the partnership interest until the end of five years, as provided in the partnership agreement, and that she did not want to mix the insurance John had left her with the estate matters. J. G. McPherson and George D. Caldwell refused to permit an audit to be made and said the O'Brien brothers would not release their claims to her insurance unless she would sell the partnership interest in Edward J. O'Brien & Company at the figure offered by them. They said that unless she sold immediately, the O'Briens would sue on the insurance trust agreement and were going to incorporate the business and freeze her out. They again repeated the threat with reference to construing the will and with reference to the bank liability. Edward C. Wirotzious corroborated Patricia

O'Brien-Smith's recital of J. G. McPherson and George D. Caldwell's threats, and what occurred at this conference. See the deposition of Edward C. Wirotzious Mrs. O'Brien-Smith's Exhibit No. 35, pages 1230a-1277a, Volume 1. On page 24 of his deposition (which are pages 1251a-1256a, Volume 1, Printed Transcript of Record), he stated:

> "Q70—Now, I am talking about what she (Mrs. O'Brien-Smith) was talking about at the meeting to Mr. Barker and others?
>
> A—She asked that she be permitted to have the books of the E. J. O'Brien Tobacco Company audited from the date of Mr. Edward O'Brien, Sr.'s death in 1928 up to the date of the proposed sale, which would have taken us up to November 5th or November 15th, which is right close to the date, as reflected in the 1935 audit report, of the sale of her partnership interest.
>
> Q71—Was anything said about the cost of that audit, or how it should be borne?
>
> A—Mrs. O'Brien told all those who were present, and I recall definitely that there were present in addition to Mrs. O'Brien, myself and L. R. Curtis, an attorney, there were Mr. McPherson, with the Fidelity & Columbia Trust Company, Mr. George Caldwell, of the Louisville Trust Company, Mr. Leo Wolford, of Bruce & Bullitt. Mr. Barker was there and Mr. Humphrey. We were in Mr. Humphrey's office in the Kentucky Home Life Building and that was the meeting at which an attempt was made to have Mrs. O'Brien sell out her interest in the E. J. O'Brien & Company. She said 'I want an audit made,—I am willing to pay for it.' And further, it was always my understanding that she wanted to pay for the audit because on the occasions that I talked with her, my firm rendered a bill to her and she paid it out of her personal funds.
>
> BY MR. SEELBACH: What date was that meeting?
>
> A—That meeting that the Judge was talking about that was held just prior to the date that Mrs. O'Brien

sold out, — sometime around the first part of November or the last part of October, I don't remember the exact date."

On page 25 of Edward C. Wirotzious' deposition he stated:

"Q72—Did she also ask for an appraisal of the property?

A—Yes, sir. She asked that the property be appraised; that she be permitted to have the properties appraised, I should say.

Q73—And audited?

A—And an audit of the books made.

Q74—Now, what was said to her from the Edward J. O'Brien & Company side on that subject as to whether they would permit it or not?

A—At that time, as well as the first meeting that we had in July, the night of the first time that I met Mrs. O'Brien, Mrs. O'Brien made the statement that she wanted to have the books audited and was willing to pay the cost thereof. Mr. Barker said that he wouldn't agree to have such done. It was at the first meeting in July we also asked to see certain contracts we felt were in existance between the tobacco interests and foreign customers and these also were refused to us. Mrs. O'Brien was refused permission to examine the official records of the company, at least every time that I was present with her when she made the request. My only interest all along in being present at these various conferences that we speak about was to get authority to make the audit of the Edward J. O'Brien Tobacco Company and its wholly owned subsidiaries."

On page 27 of Edward C. Wirotzious' deposition he further stated:

"Q82—I want to ask you if you observed and if Mr. Barker was in position to observe, as you were, Mrs.

O'Brien's own reactions to the coercion that was put upon her to sell this property at these conferences that you attended?

A—Judge Kirk, I was amazed at the time that this conference was going on at the treatment that Mrs. O'Brien was receiving at the hands of all present there excepting Mr. Curtis and myself, who had nothing to say by virtue of the fact that we were merely along as witnesses. Let me explain it like this: When you were a boy and your parents stood over you with a stick to whip you into doing something, you did it, not because you wanted to, but because you were forced into it.

Q83—Well, does that illustrate her (Mrs. O'Brien-Smith's) reaction at this conference?

A—She was taking an awful whipping over there that day. I really felt sorry for her, but there wasn't anything I could do. Mrs. O'Brien sat over there on one side of the room and she said a dozen times or more, 'I don't want to sell my interest. Why should I take my money out of that Company where I am getting a good return to get something that is not as good? I want to stay in.' "

On page 28 of Edward C. Wirotzious' deposition he further stated:

"Q84—Was that true also in July?

A—In July she made the statement she didn't want to sell out. She told me on a couple of occasions she did not want to sell out and she told me the first time I was there that she didn't want to sell out.

Q85—I didn't want to ask what she told you personally. I only want to ask what about at these conferences. Are you now undertaking to confine your answer to what occurred at the conferences?

A—At the conferences. There was the same general threat at that time of incorporating the company, freezing out her interest, and they told her at that time

she wouldn't get more than $100,000.00 for her interest. There was the same threat made at that particular meeting where it was stated that they would sue on the insurance trust agreement and would win under it unless she would sell out her interest. She said 'How do I know you have the insurance releases if I sign this paper?' Mr. George Caldwell said 'I have them right here in this pocket.' Mrs. O'Brien said, 'Can I see them?' and at that time Mr. George Caldwell said, 'I will show them to your attorney, but I will not show them to you.' Those things were very definitely imprinted in my mind because of the treatment accorded a woman by a group of men whom I thought were gentlemen. I had never seen anything like that. It makes my blood boil every time I think of it."

On page 29 of Edward C. Wirotzious' deposition he further stated:

"xQ90—Now, you say all those present were, as you put it, 'brow-beating her' into selling her interest?

A—Yes, sir, that included everybody present except me and Mr. Curtis.

xQ91—And the others that were present at the meeting you speak of were Mr. Barker and Mr. Edward P. Humphrey and Mr. Leo Wolford and Mr. McPherson and Mr. George Caldwell, and all of them were treating her the same way?

A—Yes, sir, all seemed to be talking to her at one time.

xQ92—And that was the meeting Mr. Caldwell told you he had the insurance releases in his pocket?

A—Yes, sir; he said 'right here in my pocket.' I didn't get to see them."

After the conference, Patricia O'Brien-Smith was shaken somewhat by the statements that J. G. McPherson and George D. Caldwell had made, particularly with reference

to incorporating the business and freezing her out. She told them that she was against selling her interest, but under the circumstances would have to sell.

A letter of acceptance was dictated at this conference, and Mrs. O'Brien-Smith, was instructed to go home and copy the letter in her own hand writing and mail it to her attorneys, which she did do. However, after she sent the letter of acceptance to her lawyers, she was still opposed to selling her interest, and cancelled it by telling them on the telephone that she would not sell under any circumstances. Because of her continued opposition all through October to selling the partnership interest, another conference was called toward the end of October or the first of November, 1935.

At all the conferences, Patricia O'Brien-Smith, had constantly repeated that she did not want to sell the partnership interest; that she wanted to remain in the partnership for five years allowed to her by the partnership agreement, and she did no want to mix the insurance with the estate because she was entitled to the insurance separate from the estate. She kept insisting upon an independent audit. She was assured by J. G. McPherson of Fidelity and Columbia Trust Company, and George D. Caldwell, the Joint Administrators of the estate of John A. O'Brien, that she could rely on the figures in the Peat, Marwick, Mitchell & Company audit of 1934, and that if she should ever find that John's interest was worth a dollar more than was shown in that audit, she could always recover it.

She pondered J. G. McPherson and George D. Caldwell's statements about the O'Brien claim under the so-called insurance trust agreement; about having the will of September 22, 1933, construed to mean only such personal effects as cuff links, jewelry and similar personal items;

about her interest being worth only $158,797.25 (Defendant-Appellant's Exhibit No. 53), and especially their statement that the O'Briens would incorporate the business and freeze her out. Mrs. O'Brien's statements were corroborated by Edward C. Wirotzious and F. A. Shonkwiler. See the deposition of Edward C. Wirotzious filed in the within action on August 28, 1959, Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 35, pages 1230a-1277a, Volume 1, Printed Transcript of Record. Patricia O'Brien-Smith had no cash to purchase any of the business if it were incorporated, inasmuch as she had paid bills and expenses and had the balance of her money invested in two farms and stock, and she had to borrow $15,000.00, with interest at 5% per annum, from the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, upon which to live during the two years the insurance was held up, because the Joint Administrators would not require the O'Brien Company to pay Mrs. O'Brien any money from the Company to live on. See Mrs. O'Brien-Smith's Exhibits No. 27, 27a, 27b, 27c, 27d, pages 669a-677a, R. Vol. 1.

On November 5, 1935, the final paper called an "offer" to sell the interest of the estate of John A. O'Brien, deceased, in Edward J. O'Brien & Company was presented to and signed by Patricia R. O'Brien. The same day, J. G. McPherson, on behalf of the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, and George D. Caldwell, for the Louisville Trust Company, signed the "offer" as Joint Administrators. On November 14, 1935, the Joint Administrators presented to Patricia O'Brien-Smith for her signature a letter requesting the two Trust Companies as Joint Administrators to join with her in the proposal and also authorize the Trust Companies to retain sufficient funds until the status of other bequests in the will of July 7, 1933, were finally determined. This letter

was signed by Patricia O'Brien-Smith on November 14, 1935, and referred to the so-called "offer" which Patricia O'Brien and the Joint Administrators had already signed on November 5, 1935. The letter of November 14, 1935, purporting to ask the Joint Administrators to approve and sign the "offer" to sell the partnership interest, and stating: "I have this day signed an offer * * * and I am now requesting that you approve that offer," was untrue because both Patricia O'Brien-Smith and the Joint Administrators had signed the "offer" on November 5, 1935.

In the Joint Administrators so-called final settlement of the O'Brien Estate, which is their Exhibit No. 1, filed with their complaint in the within action, on page 16 thereof which is now page 72a, Volume 1, of the Printed Transcript of Record, they have tried to alter the letter dated November 14, 1935, that they finally got Mrs. O'Brien-Smith to sign, which purports to request them to approve the "offer" made by the O'Brien brothers to buy Mrs. O'Brien-Smith's partnership interest, when in truth and fact they had already signed and accepted the offer to sell the partnership interest on November 5, 1935, and had told Mrs. O'Brien-Smith if she did not sign the offer and contract to sell the interest, that they were going to sell it without her signature because they were the administrators and they did not even need her to sign it. That is the only reason she finally signed the offer. Obtaining her signature ten days later, does not relieve them of their duties and liability under their bonds as Joint Administrators, for selling the partnership interest without an audit, without an appraisal and three years before the time as provided by the Articles of the Partnership Agreement, and for less than one third of the market value.

Although the Joint Administrators told Mrs. O'Brien-Smith that her partnership interest was being sold to James

G. O'Brien, James G. O'Brien signed the document for himself and his brothers. Later, Edwin and Joseph B. O'Brien signed one of the copies of the contract, but they did not sign on all of the copies of the agreement, and Patricia O'Brien-Smith was not notified of these additional signatures, until long after the sale was closed.

On November 30, 1935, it is claimed that a check for one hundred thousand ($100,000.00) dollars payable to the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, and the Louisville Trust Company, the Joint Administrators, was delivered to J. G. McPherson by Tom Barker as attorney for the O'Briens, though in his letter of January 30, 1936, he asserted the payment had been made on November 15, 1935.

From December 1, 1935, to February 11, 1936, there were several conferences relative to completion of the sale of Patricia O'Brien-Smith's partnership interest. Patricia O'Brien-Smith was as reluctant to go through with a sale of the partnership interest after she signed the contract as she was before she signed it and she refused to go through with it until February 11, 1936. During this period Patricia O'Brien-Smith, repeatedly said at each conference that she did not want to go through with the sale. There was a conference about the middle of December, 1935, the purpose of which was to induce Patricia O'Brien-Smith to complete the sale. At this conference Patricia O'Brien-Smith, told each one present that she did not want to sell the partnership interest but wanted an audit made, for which she would pay, and to have the interest transferred to her for five years as provided by the Partnership Agreement.

In the latter part of December there was another conference with J. G. McPherson, George D. Caldwell, Mrs. Blickenstaff, and Patricia O'Brien-Smith. At this conference, J.

G. McPherson told her he was relying on the figures given them in the 1933 and 1934 Peat, Marwick, Mitchell & Company audits of the Edward J. O'Brien & Company and that he did not think an independent audit was necessary, and he would not permit one to be made. *At that time J. G. McPherson said that if Patricia O'Brien-Smith did not sign the bill of sale and deeds that he and George D. Caldwell were going to do so anyway.* In January there was a large conference attended by Tom Barker, George D. Caldwell, J. G. McPherson, F. A. Shonkwiler and Patricia O'Brien-Smith. Again Patricia O'Brien-Smith, insisted that she did not want to sell the interest but wanted an audit to determine its value and wanted it transferred to her to hold until the end of five years. George D. Caldwell became real aggressive and insisted that Patricia O'Brien-Smith must sign the bill of sale and deeds. Patricia O'Brien-Smith refused to sign the bill of sale and deeds and left the conference in tears.

On the morning of February 11, 1936, J. G. McPherson telephoned Patricia O'Brien-Smith, and requested her to come to his office and she went to his office and Mrs. Blickenstaff went with her to his office, and McPherson told Patricia O'Brien-Smith, that he had a letter from Tom Barker saying that if Patricia O'Brien-Smith did not sign the bill of sale and deeds that night, that he was going to file suit the next day. Patricia O'Brien-Smith insisted that she would not sign any papers, but agreed to attend the meeting that evening.

The final meeting was held in an office in the Kentucky Home Life Building on the night of February 11, 1936, at eight o'clock, and lasted until midnight. Even at this meeting Patricia O'Brien-Smith did not want to go through with the sale. She was told that if she did not go through with the sale the O'Briens would sue in the morning. Finally

Patricia O'Brien-Smith signed the bill of sale and deeds. George D. Caldwell insisted that Patricia O'Brien-Smith should sign a release to the Louisville Trust Company and the O'Brien brothers for holding up the insurance more than two years, and after a protracted argument, Patricia O'Brien-Smith was finally induced to sign that release also. The Insurance releases were in turn delivered over to Patricia O'Brien-Smith. Thereafter, Tom Barker, on behalf of the O'Briens, paid the balance of Two Hundred Eighty Thousand Dollars ($280,000.00) to the Joint Administrators upon the price of Three Hundred Eighty Thousand ($380,000.00) Dollars for the interest of the estate of John A. O'Brien in the partnership.

Although the Joint Administrators had assured Patricia O'Brien-Smith that all of the One Hundred Fifty One Thousand ($151,000.00) Dollars in insurance held up under the so-called insurance trust agreement would be released and paid to her on the night of February 11, 1936, only Fifty One Thousand ($51,000.00) Dollars from the Minnesota Mutual Life Insurance Company was actually paid on that night. Subsequently the Louisville Trust Company sent letters to the Minnesota Mutual and Massachusetts Mutual Life Insurance Companies releasing its claim under the insurance trust agreement and Fifty Thousand ($50,000.00) Dollars more in insurance was paid over by the Massachusetts Mutual Life Insurance Company to Patricia O'Brien-Smith. But Fifty Thousand ($50,000.00) Dollars of the Life Insurance which was with the Massachusetts Mutual Life Insurance Company, which was made payable to Mrs. O'Brien-Smith, has never been paid and cannot be obtained by Patricia O'Brien-Smith as the O'Briens agreed under the contract of November 5-15, 1935 to do. So the contract of November 5-15, 1935, has never been fulfilled by that amount of Fifty Thousand ($50,000.00) Dollars.

Patricia O'Brien-Smith had been told by J. G. McPherson and George D. Caldwell that when the Three Hundred Eighty Thousand ($380,000.00) Dollars was paid over by Tom Barker she would receive the same. But when Tom Barker paid this amount to J. G. McPherson of the Citizens Fidelity Bank & Trust Company, he would not pay Patricia O'Brien-Smith anything unless she signed an authorization to pay her attorneys Thirty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($33,333.33); William Marshall Bullitt and his law firm of Bruce & Bullitt were paid Twenty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($23,333.33), and Ed Humphrey was paid Ten Thousand ($10,000.00) Dollars, though Mrs. O'Brien-Smith protested that William Marshall Bullitt had agreed to represent her throughout the final settlement of the O'Brien estate.

After much argument and solely for the purpose of getting her money, she finally signed the authorization and J. G. McPherson paid her Two Hundred Eighty Thousand ($280,000.00) Dollars instead of Three Hundred Eighty Thousand ($380,000.0). The One Hundred Thousand ($100,000.00) Dollars balance of the purchase price for the interest of John A. O'Brien in the partnership of Edward J. O'Brien & Company and its four subsidiaries was retained by the Joint Administrators, and is still so retained.

J. G. McPherson told Patricia O'Brien-Smith that she would be given the personal stocks belonging to her that she inherited from John A. O'Brien, upon her signing the bill of sale and deeds, but on the night of February 11, 1936, when Patricia O'Brien asked him to turn over these stocks he said he had forgotten to bring them and they were in the vault and he could not get them but that he would give them to Patricia O'Brien-Smith the first thing in the morning. On the morning of February 12, 1936,

Patricia O'Brien-Smith, accompanied by F. A. Shonkwiler, went to J. G. McPherson's office to obtain John's personal stocks which cost Fifty Two Thousand ($52,000.00) Dollars, and which McPherson had assured her would be turned over to her immediately upon the signing of the bill of sale and deeds. But J. G. McPherson told her she had signed a paper giving them arthority to keep the stocks and that she couldn't have them unless she signed a paper approving everything that the Joint Administrators had done. Patricia O'Brien-Smith refused to sign such an approval of the Joint Administrators' actions, and the stocks were kept by the Citizens Fidelity Bank & Trust Company until June 28, 1946, and were not turned over to Mrs. O'Brien-Smith until she gave them Fifteen Thousand Dollars ($15,000.00) in cash from her own funds, so that they would have Forty Thousand ($40,000.00) Dollars cash to pay the Joint Administrators Fourteen Thousand ($14,000.00) Dollars fees, and additional attorneys fees of Twenty Five Thousand ($25,000.00) Dollars which was the additional amount of fees they were claiming for representing the O'Brien Estate on June 28, 1946. Yet no final settlement of the O'Brien Estate had been filed and not even a partial settlement had been filed, and was not filed until June 21, 1950, and then only a partial settlement of the Estate was filed. Another partial settlement of the O'Brien Estate was filed on January 7, 1952, and still another partial settlement was filed on August 7, 1952. The final settlement of the O'Brien Estate will still have to be filed by the Joint Administrators in the Jefferson County Court at Louisville, Kentucky to show what they spent the One Hundred Twenty Four Thousand Six Hundred Thirty One Dollars and Ninety Five Cents ($124,631.95) cash for which is now in their hands.

10.

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 23.77% Interest Was $1,216,536.51—Without An Audit. No Audit Was Ever Made of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.

1. Amount represented as market value of Mrs. O'Brien-Smith's Interest by the Joint Administrators which was not even the book value		$ 425,649.45
2. Additional values that Mrs. O'Brien-Smith is Entitled to:		
(1) The book value of Ed- J. O'Brien & Co. shown on audit report for 1935 was $2,796,726.11 — Mrs. O'Brien - Smith's 23.77% was $664,781.92 — additional book value was	$239,132.47	
(2) Profit for 1935 of Edward J. O'Brien & Co. (23.77% of $80,870.93)	19,223.02	
(3) Increase in value of securities for 1935 in the name of the O'Brien Company (23.77% of $104,762.64)	24,902.07	
(4) Goodwill of Edward J. O'Brien & Co. (23.77% of $1,168,394.50)	277,727.37	
(5) Excess of appraised value of property, plant and equipment over book value:		
(1) Edward J. O'Brien & Co. (23.77% of $209,385.23)	49,770.86	
(2) Subsidiaries (23.77% of $80,728.83)	19,189.24	

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 23.77% Interest Was $1,216,536.51—Without An Audit. No Audit Was Ever Made Of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.—Continued from preceding page.

(6) Excess of Market value over cost value of tobacco inventories:		
(1) Edward J. O'Brien & Co. (23.77% of $129,911.19)	30,879.88	
(2) Subsidiaries (23.77% of $47,661.74)	11,329.19	
(7) Interest due from Edwin J. O'Brien, Jr.		
(1) Interest on capital deficiency (23.77% of $140,741.15)	33,454.17	
(2) On his overdraft of $144.000.00 (23.77% of $30,918.65)	7,349.36	
(8) Improper charges to expense (23.77% of $23,923.26)	5,686.55	
(9) Excess Book value of investment in subsidiaries over book value as represented by Joint Administrators on Exhibit No. 53 (23.77% of $303,924.58)	72,242.87	
Total Additional Values		**$ 790,887.06**
True Value—November 30, 1935		**$1,216,536.51**

The record reveals that no books of original entry of Edward J. O'Brien & Company or any of its four subsidiaries were either voluntarily or under orders of the Court ever submitted to Patricia O'Brien-Smith, or to any accountant for Patricia O'Brien-Smith, before the sale of her partnership interest, in 1935 by the Joint Administrators.

We have set out the recapitulation of the increased values of Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company as of November 15, 1935, on the basis of twenty three and seventy seven one hundredths (23.77%) per cent, the said percentage of which the Joint Administrators admitted that John A. O'Brien owned at the time of his death when they took the threatened deductions as shown on Defendant-Appellant's Exhibit No. 53. Further Edwin J. O'Brien, Jr., and his attorney Lewis Seelbach admitted after the Joint Administrators sold Mrs. O'Brien-Smith's partnership interest, that John A. O'Brien at the time of his death owned twenty three and seventy seven one hundredths (23.77%) per cent of Edward J. O'Brien & Company and its four subsidiaries.

In addition to the other increases, we have shown the interest due from Edwin J. O'Brien, Jr., on his capital deficiency, and on his overdraft of One Hundred Forty Four Thousand ($144,000.00) Dollars, on the basis that he should be required to pay interest on his capital deficiency in the O'Brien Company, or Mrs. O'Brien-Smith, owned twenty eight and one third (28 1/3%) per cent interest in the entire Edward J. O'Brien & Company and its four subsidiaries, instead of twenty one and one fourth (21¼%) per cent, or twenty three and seventy seven one hundredths (23.77%) per cent.

The following facts have been obtained showing that the actual value of the partnership interest owned by Patricia

O'Brien-Smith in Edward J. O'Brien & Company and its four subsidiaries at the time of the contract on November 15, 1935, was worth One Million Two Hundred Sixteen Thousand Six Hundred Fifty Five Dollars and Thirty Six Cents ($1,216,655.36), which is Seven Hundred Ninety One Thousand Five Dollars and Ninety One Cents ($791,005.91) more than the amount of Four Hundred Twenty Five Thousand Six Hundred Forty Nine Dollars and Forty Five Cents ($425,649.45), which was represented by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators on behalf of the O'Briens, to Mrs. O'Brien-Smith, before they took the threatened deductions on the basis of twenty three and seventy seven one hundredths (23.77%) per cent, as shown on Mrs. O'Brien-Smith's Exhibit No. 53, R. Vol. 2, page 1920a.

1. The Book Value Of Edward J. O'Brien and Company: On November 30, 1935, the book value of Edward J. O'Brien and Company was Two Million Seven Hundred Ninety Six Thousand Seven Hundred Twenty Six Dollars and Sixty One Cents ($2,796,726.61), as shown by the audit report of the O'Brien Company as of November 30, 1935, which was never shown to Mrs. O'Brien-Smith or any accountant for her before the sale of her partnership interest by the Joint Administrators, (see Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 43, pages 1808a-1846a, Volume 2, Printed Transcript of Record), and as reported by E. J. O'Brien, Jr., to Dun & Bradstreet, Inc. on February 10, 1936. The figures were taken from the audit report of November 30, 1935, made by Peat, Marwick, Mitchell & Company the O'Brien brothers own accountants, and reported to Dun & Bradstreet, Inc. on February 10, 1936, signed E. J. O'Brien & Company, and signed by E. J. O'Brien, Jr. Of this amount, Mrs. O'Brien-Smith's share was twenty three and seventy seven one hundredths

(23.77%) per cent or Six Hundred Sixty Four Thousand Seven Hundred Eighty One Dollars and Ninety Two Cents ($664,781.92). So, the Joint Administrators misrepresented the starting figures of Mrs. O'Brien-Smith's Book Value, or as they called it, the "Present Interest", by Two Hundred Thirty Nine Thousand One Hundred Thirty Two Dollars and Thirty Seven Cents ($239,132.37), (see Mrs. O'Brien-Smith's Exhibit No. 47, pages 1873a-1878a, Volume 2, Printed Transcript of Record).

2. Profit For 1935: It is undisputed that the net profits of Edward J. O'Brien & Company for the period from November 30, 1934, to November 30, 1935, amounted to $80,-870.93 (see Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 43). Of this amount Mrs. Patricia O'Brien-Smith's share was twenty three and seventy seven one hundredths (23.77%) per cent or $19,223.02. Instead of including any of this profit, J. G. McPherson and George D. Caldwell, representatives, of the Joint Administrators, told Patricia O'Brien-Smith that there were no profits, but that Edward J. O'Brien & Company had operated at a loss for 1935. Mrs. O'Brien-Smith is supported in this statement by the deposition of Edward C. Wirotzious (see Mrs. O'Brien-Smith's Exhibit No. 35, pages 1248a-1249a, Volume 1, Printed Transcript of Record).

> "Q62 — Well, on that day in November, just a day or two before the sale, whenever it was, was there anything said in your presence from the side of the Edward J. O'Brien Company with respect to whether or not that company, during the year 1935, had earned a profit or had suffered a loss?
>
> A — I remember Mrs. O'Brien distinctly asked what the profits for the year 1935 would amount to and Mr. Barker said there were no profits for the year ended November 30, 1935, since we are sticking strictly to dates.

Q63 — Was it stated that there would be a loss or do you recall?

A — As I recall, the statement was made similar to this: There are no profits; the company operated at a loss.

Q64 — From your examination of the audit report even that which was submitted to the court and which you have testified about, what is the revealed fact with respect to whether or not there was a profit or a loss reflected in that report for the year 1935?

A — The facts were that it operated at a profit of $80,870.93, before providing for income tax.

Q65 — Net profit?

A — That is right; net profit, as shown by the statement."

3. Increase In Value Of Securities: It is undisputed that the value of the securities owned by and in the name of Edward J. O'Brien & Company increased in the period from November 30, 1934, to November 30, 1935, in the amount of $104,762.64. Of this amount of increase, Mrs. Patricia O'Brien-Smith's share was twenty three and seventy seven one hundredths (23.77%) per cent, or $24,-902.07. Instead of including any of this increase in the value of the securities, the matter was never disclosed or even mentioned to Mrs. O'Brien-Smith. It is undisputed that this increased value was not included in the amount represented by the representatives of the Joint Administrators to Patricia O'Brien-Smith.

4. Goodwill Of Edward J. O'Brien & Company: It is undisputed that the value of the goodwill was never disclosed or even mentioned by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators. It is undisputed that no value of goodwill of the Edward

J. O'Brien & Company was included in the $425,649.45 which was represented by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators, to Patricia O'Brien-Smith as the actual value of her interest at that time before the threatened deductions were made as shown on Mrs. O'Brien-Smith's Exhibit No. 53, R. Vol. 2, p. 1920a.

The value for the goodwill of Edward J. O'Brien & Company as of November, 1935, was established at One Million One Hundred Sixty Eight Thousand Three Hundred Ninety Four Dollars and Fifty Cents ($1,168,394.50). This was corroborated by Dr. W. A. Paton, Professor of Accounting of the University of Michigan, who stated that the Edward J. O'Brien & Company's goodwill was worth at least Nine Hundred Thousand ($900,000.00) Dollars without an audit being made in arriving at the amount of the goodwill of Edward J. O'Brien & Company at $1,168,394.50, and said this figure was conservative. Of this amount Mrs. O'Brien-Smith's interest would have been entitled to twenty three and seventy seven one hundredths (23.77%) per cent as of November, 1935, or the amount of Two Hundred Seventy Seven Thousand Seven Hundred Twenty Seven Dollars and Thirty Seven Cents ($277,727.37).

5. Excess Of Appraised Value Over Book Value Of The Property, Plant And Equipment Of Edward J. O'Brien & Company And Its Wholly Owned Subsidiaries American Appraisal Company Appraisal (Defendant-Appellant's Exhibit No. 44):

(1) Property, Plant and Equipment: It is undisputed that the appraised value of the property, plant and equipment, made by the American Appraisal Company of Edward J. O'Brien & Company for Mrs. O'Brien-Smith, after

the sale of her partnership interest as stated by Fred S. Olson, President, exceeded the book value as of November 30, 1935, by $209,385.23 for Edward J. O'Brien & Company, and by $80,728.83 for the wholly owned subsidiaries as shown on Mrs. O'Brien-Smith's Exhibit No. 44, pages 1847a-1857a, Volume II, Printed Transcript of Record. It is also undisputed that none of this excess or actual appraised value was considered or included in the figure of $425,649.45 which was represented by J. G. McPherson and George D. Caldwell, representatives of the Joint Administrators, to Patricia O'Brien-Smith as the true market value of her interest in the property, plant and equipment, before the threatened deductions were made as shown on Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 53. This difference would amount upon the basis of Mrs. O'Brien-Smith's twenty three and seventy seven one hundredths (23.77%) per cent interest, to an increase of Forty Nine Thousand Seven Hundred Seventy Dollars and Eighty Six Cents ($49,770.86) for Edward J. O'Brien & Company and Nineteen Thousand One Hundred Eighty Nine Dollars and Twenty Four Cents ($19,189.24) for the four wholly owned subsidiaries.

(2) Inventory: It is undisputed that the market value of the tobacco inventory exceeded the book value. Even the audit of Peat, Marwick, Mitchell & Company for November 30, 1935, which was obtained after the sale of Mrs. O'Brien-Smith's partnership interest, by the Joint Administrators, contains the admission "inventories are valued at cost generally, which is lower than market with due regard to the various grades" (Defendant-Petitioner's Exhibit No. 43, R. Vol. II-1809a-1846a). Because Mrs. O'Brien-Smith was denied the right to have an audit made, or to see any of the original books of the O'Brien Company or its subsidiaries to ascertain the true market value of the tobacco

inventories, it is impossible to say to a precise dollar what the increased value is that should be added to the book value to arrive at a true market value for the purpose of the sale of the partnership interest. However, an accountant, has estimated the difference between the market value of the tobacco inventory and the book value or cost by taking the average percentage of gross profits from the Audits for 1934 and 1935 (made by the O'Brien Company's own accountants) and adding that to the cost of the tobacco inventory as shown. That gives an increase in the tobacco inventory for the partnership of $129,911.19, and $47,661.47 for the wholly owned subsidiaries. Thus Mrs. O'Brien-Smith's interest as of November, 1935, was entitled to twenty three and seventy seven one hundredths (23.77%) per cent of these increased values of tobacco inventories, or $30,879.88 for Edward J. O'Brien & Company and $11,329.19 for the wholly owned subsidiaries.

6. Interest Due From Edwin J. O'Brien, Jr.: It is undisputed that Edwin J. O'Brien, Jr., withdrew large amounts from the partnership of Edward J. O'Brien & Company over the entire period from January 1, 1931, to November 30, 1935. It is likewise undisputed that Edwin J. O'Brien, Jr. not only had a deficiency but actually ran an overdraft of over One Hundred Forty Four Thousand ($144,000.00) Dollars from the partnership. It is undisputed that this fact was known to the Joint Administrators and was never disclosed to Patricia O'Brien-Smith, by J. G. McPherson, and George D. Caldwell, representatives of the Joint Administrators, and that no value was included for this borrowed money. It is undisputed that the amount of the interest on the capital deficiency at 6% per annum would amount to $140,741.15. Mrs. O'Brien-Smith's twenty three and seventy seven one hundredths (23.77%) per cent of this amount would be $33,-

454.17. It is undisputed that the amount of interest on the overdraft of over $144,000.00 at 6% per annum would amount to a net charge of $30,918.65 of which Mrs. O'Brien-Smith's share of capital overdraft interest would amount to $7,349.36.

7. **Improper Charges To Expense**: The system of book value maintained by Edward J. O'Brien & Company was to keep the same at a very minimum. It was constantly sought to charge off whatever could be charged off to save federal and state taxes. In some cases the depreciation was much higher than the Government would allow and the Treasury Department rejected the charge off or charge down. Also excessive losses were claimed on abandoned property which were not allowed by the Government. One item taken from the audit made by the O'Brien brothers accountants was $23,923.26, including the debt of A. G. Martin, which should have been added to the book value to give the true value of Edward J. O'Brien & Company, as of November 5-15, 1935. The twenty three and seventy seven one hundredths (23.77%) per cent of this amount would be $5,686.55 by which amount Mrs. O'Brien-Smith's interest was entitled to be increased.

8. **Excess Book Value Of Subsidiaries On Audits Of The Subsidiaries For 1935 Over Book Value As Shown On Audit Of Edward J. O'Brien & Company For 1934, Made By O'Brien Brothers Own Accountants**: It is undisputed that the book value of the subsidiaries on the subsidiary audits for 1935, which were never shown to Mrs. O'Brien-Smith or any accountant for her before the sale of her partnership interest, exceed the book value shown on the Edward J. O'Brien & Company books as shown by the company's audit of 1934, by $303,924.58. It is undisputed that the subsidiaries were carried at $252,500.00 on the audit report of Edward J. O'Brien & Company for the

year ending November 30, 1934, while the book value on the audit reports of the wholly owned subsidiaries themselves shows $556,424.58 for the year ending October 31, 1935 (see Defendant-Petitioner Mrs. O'Brien-Smith's Exhibits Nos. 48, 49 and 50, pages 1879a-1895a, Volume 2, Printed Transcript of Record). It is undisputed that this difference was never disclosed or even mentioned to Patricia O'Brien-Smith nor included in the figure of $425,-649.45 which the Joint Administrators represented as the market value of John A. O'Brien's interest. 23.77% of this increased value of $303,924.58 would amount to $72,242.87.

The four subsidiaries wholly owned by Edward J. O'Brien & Company, on October 31, 1935, had a book value of Five Hundred Fifty Six Thousand Three Hundred Ninety Four Dollars and Fifty Eight Cents ($556,394.58).

The Tobacco Rehandling Company Limited, Incorporated on October 31, 1935, had a book value of Three Hundred Forty One Thousand Two Hundred Fifty One Dollars and Eighty Cents ($341,251.80), as taken from the audit report of October 31, 1935 made by Peat, Marwick, Mitchell & Company and reported to Dun & Bradstreet, Inc. signed by H. Smart, Secretary. See Mrs. O'Brien-Smith's Exhibit No. 48, R. Vol. 2, pp. 1879a-1884a.

The H. N. Martin Leaf Tobacco Company on October 31, 1935, had a book value of One Hundred Ninety Four Thousand Seven Hundred Thirty Five Dollars and Forty Eight Cents ($194,735.48), as taken from the Audit Report made by Peat, Marwick, Mitchell & Company and reported to Dun & Bradstreet, Inc. signed by H. Smart, Secretary. See Mrs. O'Brien-Smith's Exhibit No. 49, R. Vol. 2, pp. 1885a-1889a.

The Western Tobacco Company on October 31, 1935, had a book value of Twenty Thousand Four Hundred Thirty

Seven Dollars and Thirty Cents ($20,437.30), as taken from the Audit Report of Peat, Marwick, Mitchell & Company of October 31, 1935, and reported to Dun & Bradstreet, Inc. by E. J. O'Brien, Jr. See Defendant-Appellant Mrs. O'Brien-Smith's Exhibit No. 50, pages 1890a-1895a, Volume 2, Printed Transcript of Record. The total book value of the four subsidiaries amounted to Five Hundred Fifty Six Thousand Three Hundred Ninety Four Dollars and Fifty Eight Cents ($556,394.58) for three of the wholly owned subsidiaries. Mrs. O'Brien-Smith's capital in the four subsidiaries had a book value of One Hundred Thirty Two Thousand Two Hundred Fifty Five Dollars and Four Cents ($132,255.04).

The same three subsidiaries which J. G. McPherson and George D. Caldwell, the Joint Administrators, had told Mrs. O'Brien-Smith, only had a book value of Two Hundred Fifty Two Thousand Five Hundred Dollars ($252,500.00), but that they should be reduced fifty (50%) per cent in order to arrive at the true market value of the subsidiaries, making a figure of One Hundred Twenty Six Thousand Two Hundred Fifty Dollars ($126,250.00) on the basis of her owning twenty three and seventy seven (23.77%) per cent of the subsidiaries, they then deducted Thirty Thousand Nine Dollars and Sixty Two Cents ($30,009.62).

None of the audits for any of the four subsidiaries were ever shown to Mrs. O'Brien-Smith, or any accountant on her behalf until after the sale of her partnership interest in the O'Brien Company and its four subsidiaries. See affidavit of Edward C. Wirotzious which consists of fifty two pages and each page signed by him. Mrs. O'Brien-Smith's Exhibit No. 35, R. Vol. 1, pp. 1230a-1276a.

When the Joint Administrators filed their so-called final settlement of the O'Brien estate in the Jefferson County

Court, and in their Complaint filed in the within action, they do not state why Mrs. O'Brien-Smith's partnership interest was sold for Thirty Four Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($34,418.73) less than the book value of Four Hundred Fifty Two Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($452,418.73), as they represented to her. They misrepresented the truth, and state that the Four Hundred Fifty Two Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($452,418.73) is the appraised value of her interest when, in truth and fact, it was only a depreciated book value placed on it by Peat, Marwick, Mitchell & Company, as of December 31, 1933, for tax purposes, who are only accountants and not appraisers. The partnership interest was never appraised by anyone and the Peat, Marwick, Mitchell & Company, stated in each of their audit reports that no appraisal had ever been made of the partnership interest and that they took the word of Edwin J. O'Brien, Jr., as to the valuations placed on the partnership interest, in the Audit Reports. J. G. McPherson and George D. Caldwell admitted under oath that they did not have any appraisal made of any kind to ascertain the market value of the interest of the estate of John A. O'Brien.

The Joint Administrators stated in their complaint that the Thirty Four Thousand Four Hundred Eighteen Dollars and Seventy Three Cents ($34,418.73) was a disbursement, which statement is untrue and without any foundation (see pages 21 and 23 of the Joint Administrators' Complaint, which is found on pages 37a and 39a of R. Vol. 1).

11.

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 28.33% Interest Was $1,540,439.55—Without An Audit. No Audit Was Ever Made Of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.

1.	Amount represented as market value of Mrs. O'Brien-Smith's Interest by the Joint Administrators which was not even the book value		$ 425,649.45
2.	Additional values that Mrs. O'Brien-Smith is Entitled to:		
	(1) The book value of Edward J. O'Brien & Co. shown on audit report for 1935 was $2,796,726.11—Mrs. O'Brien-Smith's 28.33% was $792,312.51—additional book value was	$366,663.06	
	(2) Profit for 1935 of Edward J. O'Brien & Co. (28.33% of $80,870.93)	22,910.73	
	(3) Increase in value of securities for 1935 in the name of the O'Brien Company (28.33% of $104,762.64)	29,679.25	
	(4) Goodwill of Edward J. O'Brien & Co. (28.33% of $1,168,394.50)	331,006.06	
	(5) Excess of appraised value of property plant and equipment over book value:		
	(1) Edward J. O'Brien & Co. (28.33% of $209,385.23)	59,318.94	
	(2) Subsidiaries (28.33% of $80,728.83)	22,870.48	
	(6) Excess of Market value over cost value of tobacco inventories:		
	(1) Edward J. O'Brien &		

The True Market Value Of Mrs. Patricia O'Brien-Smith's Interest In Edward J. O'Brien & Company And Its Four Subsidiaries On November 30, 1935 On The Basis Of 28.33% Interest Was $1,540,439.55—Without An Audit. No Audit Was Ever Made Of The O'Brien Company, Or Its Four Subsidiaries For Mrs. O'Brien-Smith.—Continued from preceding page.

Co. (28.33% of $129,911.19)	36,803.84	
(2) Subsidiaries (28.33% of $47,661.74)	13,501.57	
(7) Interest due from Edwin J. O'Brien, Jr.		
(1) On his overdraft of $144,000.00 (28.33% of $30,918.65)	8,758.25	
(8) Improper charges to expense (28.33% of $23,923.26)	6,777.46	
(9) Excess Book value of investment in subsidiaries over book value as represented by Joint Administrators on Exhibit No. 53 (28.33% of $304,423.48)	86,243.17	
(10) Profits for 1936 of Edward J. O'Brien & Co. and its four subsidiaries (28.33% of $148,722.77)	42,143.16	
(11) Profits for 1937 of Edward J. O'Brien & Co. and its four subsidiaries (28.33% of $189,867.62)	53,789.50	
(12) Profits for 1938 of Edward J. O'Brien & Co. and its four subsidiaries (28.33% of $121,160.01)	34,324.63	
Total Additional Values		**$1,114,790.10**
True Value—November 30, 1935		**$1,540,439.55**

We made the last computation along the lines that either Edwin J. O'Brien, Jr. should have been required by the Joint Administrators to pay six (6%) per cent interest per annum on his capital deficiency in the Edward J. O'Brien & Company and its four subsidiaries, on November 5-15, 1935, for the preceding years of his capital deficiency or the Estate of John A. O'Brien at the time of his death owned twenty eight and one third (28 1/3%) per cent interest in the entire Edward J. O'Brien & Company and its four subsidiaries.

Further, Edwin J. O'Brien, Jr. should have been required by the Joint Administrators of the estate of John A. O'Brien to pay interest at the rate of six (6%) per cent per annum on his overdraft of One Hundred Forty Four Thousand ($144,000.00) Dollars, before they sold Mrs. O'Brien-Smith's partnership interest on November 5-15, 1935.

Under the Articles of Co-partnership (Mrs. O'Brien-Smith's Exhibit No. 25, pages 663a-669a, Volume 1, Printed Transcript of Record), it provided that Mrs. O'Brien-Smith's interest should remain in the O'Brien Company and its four subsidiaries, for five years, to wit: until December 31, 1938. We obtained the amount of the net profits of the Edward J. O'Brien & Company for 1936, 1937 and 1938, after the partnership interest was sold by the joint Administrators, and Mrs. O'Brien-Smith's twenty eight and one third (28 1/3%) per cent interest in the profits for the years of 1936, 1937 and 1938, are shown on the computation set forth herein.

The Joint Administrators violated the terms of the partnership agreement of Edward J. O'Brien & Company, when they sold Mrs. O'Brien-Smith's partnership interest in the O'Brien Company and its four subsidiaries, before Decem-

ber 31, 1938, and when they did not have an appraisal made to determine the market value of her interest, and when they did not have an audit made.

Article 6, of the partnership agreement dated January 23, 1931, stated:

> "In the event the estate elects to withdraw from the partnership at the expiration of five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the Company, or by appraisement, plus profits and interest, if any."

Article 6, of the partnership agreement should have been the yard stick by which Mrs. O'Brien-Smith should have been paid for her interest in the O'Brien partnership and its four subsidiaries.

The Court of Appeals of Kentucky in its opinion in the Rescission Suit (which was against the O'Brien brothers only), ruled that Mrs. O'Brien-Smith was the sole beneficiary of the will and of the Estate of John A. O'Brien, and the so-called Insurance Trust Agreement, under which the Joint Administrators were claiming the Two Hundred One Thousand ($201,000.00) Dollars Life Insurance for the O'Brien brothers was never in effect, and if so was expressly revoked before John A. O'Brien died, therefore, the Joint Administrators are stripped of all their claimed compromising points, which were only bogus claims.

It was stated in the Audit Report for the year ended November 30, 1935, of Edward J. O'Brien & Company made by the O'Brien Company's own accountant Peat, Marwick, Mitchell & Company, on page 3 thereof (Mrs. O'Brien-Smith's Exhibit No. 43, page 1812a of Volume 2, Printed Transcript of Record) that:

> "In conformity with the aforementioned provision of the Articles of Co-Partnership, the Estate of John

> A. O'Brien, deceased, automatically became a partner in the firm on the death of John A. O'Brien on January 1, 1934, and continued to be a partner until November 15, 1935."

The Audit Report further stated in Defendant-Appellant's Exhibit No. 43 on page 1811a of Volume 2, of Printed Transcript of Record, that:

> Under an agreement dated November 15, 1935, between James G. O'Brien and the Executors (Joint Administrators in this action) of the Estate of John A. O'Brien, deceased, to which the other partners and the retired partner, referred to above (Marie O'Brien Michael) gave their consent, Mr. James G. O'Brien agreed to purchase the partnership interest of the Estate of John A. O'Brien.

Thus, it was the Joint Administrators who sold Mrs. O'Brien-Smith's partnership interest in the O'Brien Company, and it was not Mrs. O'Brien-Smith who sold the interest.

12. The Joint Administrators Transferred Stocks And Securities To A Former Partner Of The O'Brien Company In Order To Reduce The Value Of Mrs. O'Brien-Smith's Partnership Interest In The Edward J. O'Brien Tobacco Company And Its Four Subsidiaries.

On June 28, 1934, without the knowledge or consent of Patricia O'Brien-Smith, the Joint Administrators, The Louisville Trust Company, and the Fidelity & Columbia Trust Company now the Citizens Fidelity Bank and Trust Company, joined with Edwin J. O'Brien, Jr., and his brothers, and transferred certain shares of stocks and securities which were owned by the Edward J. O'Brien & Company, valued at several hundred thousand dollars to Mrs. Marie O'Brien Michael, a former partner in the

O'Brien Company and its four subsidiaries, claiming that she had not been paid for her partnership interest of seventeen (17%) per cent, which she sold to four of the other partners of the O'Brien Company on May 29, 1928. Even though Mrs. Michael had already been paid in full for her seventeen (17%) per cent interest, or share in the said stocks and securities and her entire partnership interest in the O'Brien Company, and its four subsidiaries, prior to November 30, 1933, when she sold her interest.

Seventeen (17%) per cent of the following shares of stocks and securities owned by and in the name of the Edward J. O'Brien & Company, which were transferred to Marie O'Brien Michael in 1934 are listed below:

Atlantic Coast Line Railroad Company
Canadian Pacific Railway Company
Delaware & Hudson Company
Louisville & Nashville Railroad Company
New York Central Railroad Company
Norfolk & Western Railway Company
Standard Gas and Electric Company
United Light and Power Company
Larus & Brother Company
P. Lorillard Company
R. J. Reynolds Tobacco Company
Standard Oil Company of Indiana
Standard Oil Company of Kentucky
Commonwealth Life Insurance Company
Continental Motors Corporation
Philadelphia and Reading Coal and Iron
United States Steel Corporation
Corporation)
American Commonwealths Power Corporation
Standard Oil Company of New York (Socony Vacuum

All of the above named companies transferred seventeen (17%) per cent of the above listed stocks owned by the Edward J. O'Brien & Company, to Mrs. Marie O'Brien

Michael, except the Standard Oil Company of Indiana, which had been requested to issue to her, the following shares of stock:

One Certificate for 500 shares in the name of—
Mrs. Marie O'Brien Michael
One Certificate for 112 shares in the name of—
Mrs. Marie O'Brien Michael

The Standard Oil Company of Indiana refused to transfer six hundred twelve (612) shares of stock of Standard Oil Company of Indiana, held in the name of Edward J. O'Brien & Company, to Mrs. Marie O'Brien Michael, without the approval, consent, and the signature of Mrs. Patricia O'Brien-Smith, whom they considered a full partner of the Edward J. O'Brien & Company, however, later they did make the transfer of the said stocks without the knowledge or approval of Mrs. O'Brien-Smith, and she did not learn that the Joint Administrators had signed with Edwin J. O'Brien, Jr. to make the transfer of the said stocks to Mrs. Marie O'Brien Michael until long after they had made the transfers of the stocks and sold her partnership interest in the O'Brien Company and its four subsidiaries. Since the District Court, refused to have a trial of the within action, the Defendant-Appellant, was unable to obtain all the facts pertaining to the transfer of the stocks by the Joint Administrators, because her attorney was never permitted to cross examine George D. Caldwell, or J. G. McPherson concerning the transfer of the stocks and securities.

In order to get the stocks transferred from the name of Edward J. O'Brien & Company on June 28, 1934, Edwin J. O'Brien, Jr., signed and swore to an affidavit that on June 11, 1930, the partnership of Edward J. O'Brien & Company was composed of his mother and three brothers; that on

January 1, 1934, John A. O'Brien died; that under agreements set forth in Articles of Partnership his interest would remain in said partnership until five (5) years from the date of his death, to wit, until December 31, 1938. See Mrs. O'Brien-Smith's Exhibit No. 64, page 1948a, Volume 2, Printed Transcript of Record, also see Mrs. O'Brien-Smith's Exhibits No. 61, 62 and 63, pages 1941a through 1948a, Volume 2, Printed Transcript of Record.

This issue has never been before any Court before and it has never been ruled on by any Judge of any Court.

In the Audit Report as of November 30, 1935, there was set up the amount of One Hundred Thirty Eight Thousand Six Hundred Nine Dollars and Twenty One Cents ($138,-609.21), as being the amount payable to a former partner, which represents a liability shown by the books as due to someone. That was either an added balance to Mrs. Michael or else that was the excess overdraft of Edwin J. O'Brien, Jr., which reflected his withdrawal.

The overdraft of Edwin J. O'Brien, Jr., which would be in the nature of an asset, or account receivable would be off-set by the account payable of a similar amount as representing the account payable to former partners.

Sach a set-up liability reduced the total net worth of the O'Brien Company and its four subsidiaries, and the value of Mrs. O'Brien-Smith's partnership interest, which the Joint Administrators approved and sanctioned with the O'Brien brother, see deposition of Edward C. Wirotzious, Mrs. O'Brien-Smith's Exhibit No. 35, R. Vol. 1, pp. 1260a-1269a.

13. The Joint Administrators Violated Their Written Agreements To Act As Administrators For One And One Half (1½%) Per Cent, When They Filed Their Complaint For And Were Granted $38,967.82 By The District Court.

The Joint Administrators violated their written agreements to act as administrators for one and one half (1½%) per cent, when they filed their complaint for and were granted Thirty Eight Thousand Nine Hundred Sixty Seven Dollars and Eighty Two Cents ($38,967.82) by the District Court. The Louisville Trust Company had a written agreement dated July 7, 1933, with John A. O'Brien before his death, that they would act as administrator of his will and his estate for one and one half (1½%) per cent on the total assets of his estate. They reported that the total assets of the O'Brien Estate was Five Hundred Nine Thousand ($509,000.00) Dollars in the inventory filed in the office of the Clerk of the Jefferson County Court, on May 31, 1934. See Mrs. Smith's Exhibit No. 55, pages 1927a-1928a, and Exhibit No. 75, pages 1982a-1989a, Volume 2, Printed Transcript of Record.

William Marshall Bullitt, representing the Citizens Fidelity Bank & Trust Company, as well as Mrs. O'Brien-Smith, and J. G. McPherson, Vice-President of the Citizens Fidelity Bank & Trust Company, agreed with Mrs. O'Brien-Smith, that if their Trust Company was appointed as Joint Administrator with The Louisville Trust Company, that the two Trust Companies would agree to act as administrators and for a final settlement of the O'Brien estate for one and one half (1½%) per cent each, on the total assets of the estate, making a total of three (3%) per cent. The Citizens Fidelity Bank & Trust Company further confirmed their agreement to act as Joint Administrator of the O'Brien estate for one and one half (1½%) per cent

to each of the Trust Companies, and that the total amount of the Joint Administrators' fees would be Fourteen Thousand ($14,000.00) Dollars for the final settlement of the John A. O'Brien estate, by their letter dated October 25, 1935, addressed to Mrs. John A. O'Brien, (now Smith) Alta Vista Road, Louisville, Kentucky, and signed by J. G. McPherson, Vice-President of the Fidelity & Columbia Trust Company now Citizens Fidelity Bank & Trust Company. See the letter which is Mrs. Smith's Exhibit No. 56, pages 1929a-1930a, R. Vol. 2.

On March 25, 1936, Ernest Kampfmueller, Assistant Treasurer of Fidelity & Columbia Trust Company, signed and filed an affidavit for the Joint Administrators, with the Kentucky State Tax Commissioner, that the Fidelity & Columbia Trust Company and The Louisville Trust Company were asking the sum of Fourteen Thousand ($14,000.00) Dollars as compensation for acting as Joint Administrators for the estate of John A. O'Brien, deceased. See the affidavit, Mrs. Smith's Exhibit No. 58, pages 1933a-1934a, Volume 2, Printed Transcript of Record, which reads as follows:

"STATE OF KENTUCKY
COUNTY OF JEFFERSON SS

(1) Affiant, Ernest Kampfmueller, states that he is Assistant Treasurer of FIDELITY AND COLUMBIA TRUST COMPANY, which company is the duly qualified and acting ADMINISTRATOR WITH THE WILL ANNEXED OF THE Estate of JOHN A. O'BRIEN, jointly with the LOUISVILLE TRUST COMPANY.

Affiant states that the Fidelity and Columbia Trust Company and the Louisville Trust Company are asking the sum of Fourteen Thousand Dollars ($14,000) as compensation for services rendered and that said amount will be paid and divided equally between the

Fidelity and Columbia Trust Company and the Louisville Trust Company before the estate is settled.

(signed) Ernest Kampfmueller

Subscribed and sworn to before me this 25 day of March 1936. My notarial commission expires Sept. 7, 1939.

(signed) Henrietta Millett
Notary Public, Jefferson County, Kentucky.

STATE OF KENTUCKY
COUNTY OF FRANKLIN Set.

I, Ruth Lucas Stafford, a Notary Public in and for the County and State aforesaid, do certify that the foregoing is a true and correct copy of same as appears of record in the State Tax Commission in regards to the John A. O'Brien estate.

Given under my hand this the 17th day of August, 1937.

(signed) Ruth Lucas Stafford
Notary Public, Franklin County, Ky.
My commission expires Jan. 9, 1938."

14. The Attorneys For The Joint Administrators Violated The Terms Of Their Agreement To Settle The Estate Of John A. O'Brien For $25,000.00, When They Filed Their Complaint For And Were Awarded An Additional $52,000.00 With 6% Interest A Total Of $107,333.33 By The District Court.

The attorneys for the Joint Administrators violated the terms of their agreement to settle the Estate of John A. O'Brien for Twenty Five Thousand ($25,000.00) Dollars when they filed their complaint and were awarded an additional Fifty Two Thousand ($52,000.00) Dollars with six (6%) per cent interest thereon, by the District Court, making a total of One Hundred Seven Thousand Three Hun-

dred Thirty Three Dollars and Thirty Three Cents ($107,-333.33) without a trial of the within action.

William Marshall Bullitt of the law firm of Bruce & Bullitt, now the law firm of Bullitt, Dawson and Tarrant, made an agreement with Mrs. Patricia O'Brien-Smith to represent her and the Joint Administrators of the estate of John A. O'Brien in the final settlement of the O'Brien estate for Twenty Three Thousand ($23,000.00) Dollars. This agreement is substantiated by the two (2) affidavits signed and filed by Ernest Kampfmueller, Assistant Treasurer of the Fidelity & Columbia Trust Company, (now Citizens Fidelity Bank & Trust Company) on March 20, 1936.

On March 20, 1936 Ernest Kampfmueller, Assistant Treasurer of the FIDELITY & COLUMBIA TRUST COMPANY, SIGNED AND FILED AN AFFIDAVIT FOR THE JOINT ADMINISTRATORS in the office of the Kentucky State Tax Commissioner, and stated that as personal representatives of the estate of John A. O'Brien, that the Joint Administrators had paid for legal services rendered to them for the final settlement of the O'Brien estate the sum of Twenty Five Thousand ($25,000.00) Dollars, and that the affidavit was made for the purpose of inducing the State Tax Commissioner of the State of Kentucky, in determining the amount of Kentucky Inheritance tax due from the estate of John A. O'Brien, to allow as a proper deduction for attorneys' fees for the final settlement of the O'Brien estate, the amount of Twenty Five Thousand ($25,000.00) Dollars. See Mrs. Smith's Exhibit No. 17, R. Vol. 1, pp. 635a-636a, which is as follows:

(1)
"STATE OF KENTUCKY
COUNTY OF JEFFERSON SS:

Affiant, Ernest Kampfmueller, states that he is Assistant Treasurer of the Fidelity and Columbia Trust Company of Louisville, Kentucky, which company is the duly qualified and acting administrator with the will annexed of the estate of John A. O'Brien jointly with the Louisville Trust Company.

Affiant states that as personal representative of the Estate of John A. O'Brien they have paid to Edward P. Humphrey for legal services rendered the sum of Ten Thousand Dollars ($10,000.00) and have also paid to Bruce & Bullitt for legal services rendered the sum of Thirteen Thousand Dollars ($13,000.00).

Affiant further states that before the estate is settled there will be paid to Gordon, Laurent and Ogden for legal services rendered a sum of not less than Two Thousand Dollars ($2,000.00).

This affidavit is made for the purpose of inducing the State Tax Commission of the State of Kentucky in determining the amount of Kentucky Inheritance tax due from the estate of John A. O'Brien to allow as a proper deduction attorney fees in the amount of Twenty Five Thousand Dollars ($25,000.00).

(signed) Ernest Kampfmueller

Subscribed and sworn to before me this 20th day of March, 1936.

My notarial commission expires Sept. 7, 1939.

(signed) Henrietta Millett
Notary Public, Jefferson County, Kentucky

STATE OF KENTUCKY
COUNTY OF FRANKLIN Sct:

I, Ruth Lucas Stafford, a Notary Public in and for the County and State aforesaid, do certify that the foregoing is a true and correct copy of same as appears of record in the State Tax Commission in the papers of the John A. O'Brien estate.

Given under my hand this the 17th day of August, 1937.

(signed) Ruth Lucas Stafford
Notary Public, Franklin County, Ky.
My commission expires Jan. 9, 1938."

On August 29, 1936, D. S. Bliss, Deputy Commissioner of Internal Revenue, Washington, D. C., wrote a third letter to the Fidelity & Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, in reference to the report to them by the Joint Administrators that the Joint Administrators' fees of Fourteen Thousand ($14,000.00) Dollars, and attorneys' fees of Twenty Five Thousand ($25,000.00) Dollars, proposed to be allowed as deductions from Federal Estate taxes was for the final settlement of the estate of John A. O'Brien. See Mrs. Smith's Exhibit No. 19, R. Vol. 1, pp. 640a-642a, which is as follows:

(2) "TREASURY DEPARTMENT
WASHINGTON

Office Of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To
MT-ET-CI-2244-Kentucky
Estate of John A. O'Brien
Date of death—January 1, 1934

AUG 29 1936

Fidelity and Columbia Trust Company, Administrator,
Louisville, Kentucky.

Sirs:

Reference is made to Bureau letters of January 29 and June 15, 1936, which tentatively determined a deficiency in estate tax in the above-named estate.

A protest against the tentative determination was filed in this office on April 8, 1936, and additional evidence in support of a claim for deductions on account of payment of Federal income taxes was received

on July 6, 1936. The protest relates to the following items and adjustments are proposed as indicated:

DEDUCTIONS

	Returned	Tentatively Determined	Proposed Redetermination
Administrator's commission	$15,279.38	$0.00	$14,000.00
Attorneys' fees	10,000.00	0.00	25,000.00
Additional Federal income tax for year 1933 and interest to date of death	0.00	0.00	1,153.14

It is proposed to allow a deduction for administrator's commission in the amount of $14,000.00, which the affidavit of the administrator shows will be claimed and paid.

It is proposed to allow deduction for attorneys' fees in the amount of $25,000.00. The affidavit of the administrator shows that $23,000.00 has been paid and that an additional $2,000.00 will be paid.

No deduction is proposed for State and County taxes which were paid in the sum of $342.78, since these taxes had not accrued prior to the date of decedent's death and are not an allowable deduction under Article 37 of Regulations 80.

2-Estate of John A. O'Brien

Deduction is allowed for deficiency income tax for the year 1933 together with interest thereon from November 1933 to the date of the decedent's death. No deduction is allowed for interest that accrued after the date of decedent's death.

The following summary is submitted:

	Proposed Redetermination
Gross estate	$693,742.05
Deductions, 1926 Act	149,644.40
Net estate, 1926 Act	$544,097.65
Net estate, 1932 Act	$594,097.65
Gross tax, 1926 Act	$ 19,704.88
Credit for estate or inheritance tax	15,763.90
Net tax, 1926 Act	$ 3,940.98
Total gross taxes, 1926 and 1932 Acts	$ 61,232.69
Gross tax, 1926 Act	19,704.88
Gross additional tax	$ 41,527.81
Net tax, 1926 Act	3,940.98
Total net tax	$ 45,468.79
Returned tax	41,683.81
Deficiency	$ 3,784.98

Execution of the enclosed waiver will enable the Bureau to assess the deficiency and expedite the closing of this case and will also stop the running of interest.

This is not a final determination of the tax liability in this case and no appeal herefrom lies to the Board of Tax Appeals.

Your reply within twenty days from the date of this letter will be appreciated.

Respectfully,
(signed) D. S. Bliss
D. S. Bliss
Deputy Commissioner."

Encl.—Waiver

It will be noted from these three Exhibits, the two affidavits of Ernest Kampfmueller, and the third letter from D. S. Bliss, Deputy Commissioner of Internal Revenue,

Washington, D. C., that the Joint Administrators had agreed in 1934, and 1936, and represented to the State Tax Commissioner of the State of Kentucky and to the Commissioner of Internal Revenue, that their fees would be Fourteen Thousand ($14,000.00) Dollars, for the final settlement of the O'Brien estate, and that their attorneys' fees would be Twenty Five Thousand ($25,000.00) Dollars for the final settlement of the estate of John A. O'Brien.

It will be further noted from the Deputy Commissioner's letter, that the total assets of the estate of John A. O'Brien, deceased, reported by the Joint Administrators had total assets and was valued at Six Hundred Ninety Three Thousand Seven Hundred Forty Two Dollars and Five Cents ($693,742.05). But in the Joint Administrators' complaint, filed in the within action, and in their inventory of the O'Brien estate copied therein, a copy of which they had filed in the O'Brien Estate on May 31, 1934, in the Jefferson County Court, (Mrs. O'Brien-Smith's Exhibit No. 75, pages 1982a-1989a, Volume 2, Printed Transcript of Record) and also in their Exhibit No. 1, filed with their complaint. In the within action, they swore that the total assets of the estate of John A. O'Brien at the time of his death was only Five Hundred Nine Thousand Five Hundred Seventy Five Dollars and Eighty Six Cents ($509,575.86), see Plaintiffs-Respondents' complaint page 21, which is page 37a, Volume 1, of the Printed Transcript of Record. Yet the Joint Administrators sold the partnership interest inherited by Mrs. O'Brien-Smith in the Edward J. O'Brien Tobacco Company and its four subsidiaries, for Three Hundred Eighty Thousand ($380,000.00) Dollars. See the inventory which is Mrs. O'Brien-Smith's Exhibit No. 75, R. Vol. 2, pp. 1982a-1988a.

Edward P. Humphrey was not employed by Mrs. O'Brien-Smith to represent her or the Joint Administrators in the

final settlement of the O'Brien estate, or in any matter pertaining to her partnership interest from the O'Brien estate and they knew it. Edward P. Humphrey was employed by Mrs. O'Brien-Smith to collect the Life Insurance left her by her husband of Two Hundred One Thousand ($201,000.00) Dollars, and they knew that. When the Joint Administrators had Ernest Kampfmueller, Assistant Treasurer of the Fidelity & Columbia Trust Company, file an affidavit under oath, that Edward P. Humphrey was paid Ten Thousand ($10,000.00) Dollars to represent the Joint Administrators in the final settlement of the O'Brien estate, they knew this was not true because they had paid the law firm of Bruce & Bullitt, for legal services rendered to them, the sum of Twenty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($23,333.33).

The Louisville Trust Company also had paid the law firm of Gordon, Laurent & Ogden, who was representing The Louisville Trust Company and the three brothers of John A. O'Brien, to represent them in the final settlement of the O'Brien estate for which they paid them the sum of Two Thousand ($2,000.00) Dollars, so, if their claims in their complaint for additional fees for the Joint Administrators and for their attorneys for the final settlement of the O'Brien estate which the District Court awarded, are valid then they have made fraudulent misrepresentations both to the Tax Commissioner of the State of Kentucky, and to the Commissioner of Internal Revenue at Washington, D. C., regarding the Joint Administrators' fees, the lawyers fees, and the Market value of the Estate of John A. O'Brien.

The District Court awarded the Joint Administrators, The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, Twenty Three Thousand Seven Hundred Fifty Six Dollars and Ninety Eight Cents ($23,-756.98) with six (6%) per cent interest from March 5,

1952 to November 9, 1962, a total sum of Thirty Eight Thousand Nine Hundred Sixty Seven Dollars and Eighty Two Cents ($38,967.82), and to the attorneys for the Joint Administrators, a total sum of One Hundred Seven Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($107,333.33).

Under the statutes and laws of Kentucky, it was the duty of the Joint Administrators to turn over to Mrs. O'Brien-Smith the partnership interest that she inherited from her husband John A. O'Brien, in the Edward J. O'Brien Tobacco Company, and its four subsidiaries, nine months after his death, to-wit on October 1, 1934, and through their representatives they had stated to her during the entire first nine months after John's death, that they would turn it over to her.

The brothers of John A. O'Brien never at any time threatened to file suit to set aside John A. O'Brien's last will, dated September 22, 1933.

From October, 1934, until May 1, 1935, the situation remained the same except for various conferences. In the meantime, Patricia O'Brien-Smith did not receive any of the insurance money from the Minnesota Mutual Life Insurance Company and the Massachusetts Mutual Life Insurance Company.

About May 1, 1935, one and a half years after William Marshall Bullitt was employed by Mrs. O'Brien-Smith, she learned for the first time that William Marshall Bullitt and the law firm of Bruce & Bullitt, now Bullitt, Dawson & Tarrant, was representing the Minnesota Mutual Life Insurance Company, and the Massachusetts Mutual Life Insurance Company, and that they had been representing them during the entire time that they had been employed by her, and that they had advised the two Insurance Com-

panies not to pay her the insurance, so that they could create a law suit and get two more law fees, and force her to sell her partnership interest. They knew that there was no one named as beneficiary on any of the Life Insurance policies except Mrs. O'Brien-Smith, and that the beneficiary had never been changed on any of the policies. The Insurance Companies said that they had never heard of the so-called Insurance Trust Agreement. Further, Mrs. O'Brien-Smith learned that they had drawn-up interpleaders on behalf of the two Insurance Companies to pay the money into the United States District Court at Louisville. William Marshall Bullitt then told Mrs. O'Brien-Smith that she would have to employ other counsel to represent her on the insurance and to file the answers for her to their interpleaders.

Since none of the members of the law firm of Bruce & Bullitt represented Mrs. O'Brien-Smith in collecting her insurance due her as beneficiary under the policies, and since both they and the Joint Administrators contend in their complaint and their so-called final settlement of the O'Brien estate, which is their Exhibit No. 1, thereto, that Mrs. O'Brien-Smith had other counselors and advisers, and that she sold the partnership interest, then why were they paid Twenty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents ($23,333.33) on February 11, 1936, by the Joint Administrators.

About May 1, 1935, Mrs. O'Brien-Smith then employed Edward P. Humphrey to collect the insurance due her as beneficiary under the policies and to prepare the answers to the interpleaders that the Bruce & Bullitt law firm had drawn up in behalf of two of the Insurance Companies, namely: the Minnesota Mutual Life Insurance Company, and the Massachusetts Mutual Life Insurance Company.

B. The Joint Administrators Violated Their Statutory Duties By Failing To File The Final Settlement Of The Estate Of John A. O'Brien On March 1, 1936, In The Jefferson County Court.

1. The Joint Administrators under the provisions of the Kentucky Statutes K.S. 3858 which is now K.R.S. 25.175 et seq., and the Law in the State of Kentucky, were due to file a final settlement of the estate of John A. O'Brien, on March 1, 1936, in the office of the Clerk of the Jefferson County Court, which would have been two years from the date they qualified as Joint Administrators of the said estate, to-wit on March 1, 1934. Further, Judge Mark Beauchamp, Judge of the Jefferson County Court, notified the Joint Administrators that the final settlement of the Estate of John A. O'Brien was due to be filed in the office of the Clerk of the Jefferson County Court on March 1, 1936 (Mrs. Smith's Exhibit No. 22 R. I—652a-653a). The said notice is as follows:

"#24146 Jefferson County Court
(1) Mark Beauchamp, County Judge

The Louisville Trust Company January 21, 1939
5th and Market Sts.,
Louisville, Ky.

Dear Sirs:—

On March 1st, 1934, You Were Appointed Co-Executor Estate John A. O'Brien, Deceased, In The Jefferson County Court. Under The Provisions Of The Law Your Settlement Was Due March 1st, 1936.

Please Take Up This Matter At Once With Any Of The Following Commissioners."

(The Judge listed six commissioners, their addresses and telephone numbers.)

The Joint Administrators failed and refused to file the final settlement of the O'Brien estate and did not even file

a partial settlement of said estate in the Jefferson County Court until June 21, 1950, even though the Court of Appeals of Kentucky had also ordered the Joint Administrators four times in four separate opinions rendered in favor of Mrs. Patricia O'Brien-Smith, to file a final settlement of the O'Brien Estate in the Jefferson County Court and not in the Jefferson Circuit Court.

Judge Horace M. Barker, Judge of the Jefferson County Court, "Issued A Rule," against the Joint Administrators to file a final settlement of the Estate of John A. O'Brien in the Jefferson County Court on June 2, 1949, which was ten years later. The Joint Administrators still would not comply with the rulings of the Court and filed an appeal in the Jefferson Circuit Court from the "Rule Issued," against them in the Jefferson County Court, but they never prosecuted that Appeal, and the case laid dormant for several years, and was not finally disposed of until November 20, 1953, and October 1954.

2. **1936-1950**

Mrs. O'Brien-Smith Was Upheld By Four Opinions Of The Court Of Appeals Of Kentucky In Her Opposition To The Joint Administrators Settling Their Accounts Of The Estate Of John A. O'Brien In The Jefferson Circuit Court.

The Joint Administrators have contended that "Mrs. Smith" obstructed their filing a final settlement of the John A. O'Brien estate in the Jefferson County Court at Louisville, Kentucky, but they have not filed or offered any proof in the within action to prove their contentions.

From February 11, 1936, to February 6, 1937, Mrs. Smith did not see or have any correspondence or conferences with anyone representing the Joint Administrators.

On February 6, 1937, Mrs. Smith wrote a letter to the Joint Administrators requesting them to file suit for Rescission of the Contract of Sale of her Partnership Interest in the Edward J. O'Brien Tobacco Company, and its four subsidiaries which they sold some time in 1935, and requested them to set a date for a conference with her and her counsel Judge Edward C. O'Rear of Frankfort, Kentucky. (Mrs. Smith's Exhibit No. 24, R. I—658a-663a.)

The Joint Administrators refused to have a conference with Mrs. Smith, and her attorney Judge Edward C. O'Rear. The Joint Administrators refused to file suit for the Rescission of the Contract of Sale of Mrs. Smith's Partnership Interest in the Edward J. O'Brien Tobacco Company, and its four subsidiaries.

In the request of Mrs. Smith to the Joint Administrators to file suit for rescission of the sale of the partnership interest, she offered to pay into Court the entire amount that she had received for the sale of the said partnership interest, and restore the parties to status quo.

On February 18, 1937, after the Joint Administrators were already in default one year of their statutory duties, they by-passed the Jefferson County Court and filed their first trumped-up settlement suit of the Estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, No. 250-301, consisting of three (3) typewritten pages and filed therewith a copy of the last will of John A. O'Brien dated September 22, 1933, and a copy of a purported will of John A. O'Brien dated July 7, 1933, marked Exhibit "B," and a copy of the Order of Appointment of the two Trust Companies as Joint Administrators with the will annexed of the estate of John A. O'Brien marked as their "Exhibit A", (see Mrs. Smith's Exhibit No. 23, R. I—654a-657a).

On February 18, 1937, the Joint Administrators had only to file their final settlement of the O'Brien Estate in the

Jefferson County Court, and simply retain the six thousand ($6,000.00) dollars for bequests in Mr. O'Brien's so-called first will of July 7, 1933, if they had really thought that the two bequests therein of the one thousand ($1,000.00) dollars and the five thousand ($5,000.00) dollars were bona fide bequests, but they knew they were not. They knew then that Mrs. Smith was the sole beneficiary of John A. O'Brien's last will and of his entire Estate, as held by an opinion of the Court of Appeals of Kentucky. No steps were taken in their first settlement suit until September 22, 1944.

In May, 1945, before Mrs. Smith filed an answer to the trumped-up first settlement suit of the Trust Companies, she filed a Special and General Demurrer. Judge Gilbert Burnett, the trial Judge, overruled both. Mrs. Smith then filed a Writ of Prohibition in the Court of Appeals of Kentucky, pointing out the defects of the Petition and that it did not comply with Section 429 of the Civil Code. The Court of Appeals of Kentucky denied the Writ and held that Mrs. Smith had her remedy by Appeal after trial.

Trial was had and she got that remedy six (6) years later, on June 8, 1948, and May 16, 1950. So there was merit to her every contention from the beginning to the present day, as we have proved. That was six (6) years of long tiresome harassing, expensive litigation, all of which was paid for out of Mrs. Smith's own funds.

Bear in mind that the Joint Administrators were one year in default of their statutory duties before they filed their first trumped-up settlement suit, and that the Court of Appeals has rendered two Opinions in favor of Mrs. Smith, in the first settlement suit, which held that the Joint Administrators' Petition did not state a cause of action under Section 429 of the Civil Code, to settle the Estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, nor did the Joint Administrators' Amended Petition filed

therein in the Jefferson Circuit Court on November 30, 1948. So, if there was no Petition to sustain a cause of action, then there was no Petition to sustain the stay of proceedings requested by Mrs. Smith. The joint Administrators' attorney, William Marshall Bullitt, admitted and stated in an argument in open Court before four (4) of the Judges of the Court of Appeals of Kentucky, on October 3, 1950, that the Joint Administrators had blundered in the filing of the settlement suits of the O'Brien Estate in the Jefferson Circuit Court, and that they had made a grievous mistake, but he only admitted that they held up the settlement of the O'Brien Estate from September, 1944, until June 21, 1950; but the truth is the Joint Administrators have held up the settlement of the Estate from March 1, 1936, until the present day.

Mrs. Smith won the settlement suit by two favorable decisions in the Court of Appeals of Kentucky, rendered on both the first and second appeals, on June 8, 1948, and May 16, 1950. See the cases of Patricia R. Smith v. The Louisville Trust Company and Citizens Fidelity Bank and Trust Company, 308 Ky. 189, 213 S.W. (2d) 987 (June 8, 1948). Petition for Rehearing Denied October 29, 1948. The First Opinion held:

> "In the instant case Mrs. Smith filed a special and a general demurrer to the petition. The special demurrer was based on the allegation that the Court had no jurisdiction of the subject matter of the action. The general demurrer was based on the allegation that the petition does not state facts sufficient to constitute a cause of action against the defendant (appellant), or for the settlement of the estate of John A. O'Brien, deceased."
>
> "It will be noted that the petition in this case does not follow the requirements of Section 429, supra, in that it does not state the amount of the debts, if any, the

nature or value of the property, real or personal, of the decedent; neither does it aver that the personal estate is insufficient for the payment of all or any debts."

"The petition further alleged that the plaintiffs had caused all estate and inheritance taxes, 'except certain disputed and undetermined portions thereof,' and all debts of the estate to be paid, and that they had collected all income arising therefrom, and had kept an account of all receipts and disbursements, and that the plaintiffs at the time of the filing of the petition were ready to make final settlement of the estate."

"It is obvious that the allegations of the petition fall short of the requirements of an action to give a circuit court jurisdiction of a case for the settlement of an estate. It is equally obvious from the averments of the petition that the estate had been settled, except the payment of the specific bequests to the College of Arts and Sciences of Georgetown University and the Bishop of the Roman Catholic Diocese of Louisville; and since no contention was made in respect to the payment of these bequests, the Administrators had only to file their settlement with the Judge of the Jefferson County Court. It is apparent that the Jefferson Circuit Court should have sustained the general demurrer to the petition, because it did not state a cause of action for the settlement of an estate.

The Judgment is reversed."

In the Second Appeal filed by the Joint Administrators in their first settlement suit, the Court of Appeals of Kentucky ruled in favor of Mrs. Smith in the same case of The Louisville Trust Company and Citizens Fidelity Bank and Trust Company v. Smith, 313 Ky. 15, 230 S.W. (2d) 64 (May 16, 1950). This case held:

"We only ask, where would we be going, if, in the settlement of estates properly to be made in the county court, we should follow a rule for administrators to

submit a proposed settlement to those interested, and merely because of disapproval thereof, permit action to be brought in circuit court. It is the duty of the administrator to settle. One of the purposes of settlement in the county court is to give the parties interested an opportunity to file objections seasonably and properly. There is no reason why an exception should prevail in Jefferson County. This matter has been unreasonably prolonged. The settlement should be made as per the opinion in the former appeal.

The judgment is affirmed."

After the Joint Administrators refused to file suit for rescission of the sale of the partnership interest, on March 10, 1937, Judge Edward C. O'Rear of Frankfort, Kentucky, representing Mrs. Smith, filed suit for the Rescission of said Contract of Sale of Mrs. Smith's Partnership Interest in Edward J. O'Brien Company and its four subsidiaries, in the Jefferson Circuit Court Chancery Branch, First Division, No. 250-536.

In the first Petition filed in the "Rescission Suit", the Joint Administrators were named with the O'Brien brothers as defendants, and the suit was against them in their individual capacities. In March, 1938, the Judge of the Jefferson Circuit Court ruled that "the Petition For The Rescission of The Contract Of Sale must be reformed and not amended", whereupon the order was complied with, and when Mrs. Smith filed the Reformed Petition on April 11, 1938, in the Jefferson Circuit Court in the Rescission Suit, the Joint Administrators were only named as "NOMINAL PARTIES DEFENDANT", so that Mrs. Smith could maintain the action in her own name, since the Joint Administrators had refused to file suit for Rescission Of The Contract of the sale of the Partnership Interest. In the Rescission Suit, no relief was sought or asked for against the Joint Administrators in the prayer of the Peti-

tion, and no Proof Was Introduced Against Them. Yet, the Joint Administrators bitterly opposed the Rescission of the Contract for Sale of the Partnership Interest, and filed stronger briefs in the Rescission suit against the estate of John A. O'Brien, and against Mrs. Smith, than the attorneys did for the defendants O'Briens. All of the expenses and briefs which the Joint Administrators had printed and filed against the estate and Mrs. Smith in the rescission suit, were paid for out of the cash belonging to Mrs. Smith which has been in their possession since February 11, 1936, which the District Court approved by his order and Summary Judgments filed and entered on November 9, 1962, in the within action, yet in his opinion he held that he had no jurisdiction of probate matters.

It was not necessary for the Trust Companies to employ two separate law firms to represent them against the O'Brien estate, and the sole beneficiary, Patricia O'Brien-Smith.

The final opinion rendered in the rescission suit, held that Mrs. Smith's counselors and advisors could have ascertained what the market value was of her Partnership interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries, and that it was not the duty of the O'Brien Brothers to disclose to her the market value of her said interest and the amount of her profits for the year of 1935.

Mrs. Smith's counselors and advisors were the Joint Administrators, and William Marshall Bullitt, her attorney and their attorney, who owned over fifty one (51%) per cent of The Citizens Fidelity Bank & Trust Company, and who was paid twenty three thousand three hundred thirty three dollars and thirty three cents ($23,333.33) on February 11, 1936, to settle the O'Brien Estate, which he refused to do after he was paid.

It is contended by the Joint Administrators that Mrs. Smith delayed the settlement of the John A. O'Brien Estate from March, 1937, until September, 1944, because she filed a Motion in March, 1937, for a stay of proceedings in the Joint Administrators first trumped-up settlement suit in the Jefferson Circuit Court, until the merits of the Petition for rescission of the sale of the partnership interest would be ruled upon. The Court of Appeals of Kentucky ruled that there was no petition to sustain a cause of action in the Joint Administrators first Settlement Suit. So the delay was caused only by the Joint Administrators.

Mrs. Smith lost the Rescission Suit, finally in May, 1944. The Joint Administrators re-opened their first settlement suit in September, 1944, and lost it on June 8, 1948, after two Appeals and Petitions for rehearing were overruled on May 16, 1950, supra.

3. **1949-1954**

All The Records In The Estate Of John A. O'Brien From The Office Of The Clerk Of The Jefferson County Court, Were Missing Which Were Taken By The Joint Administrators To The Jefferson Circuit Court On The Joint Administrators' Appeal From The "Rule Issued" Against Them By The Judge Of The Jefferson County Court, To File The Final Settlement Of The Estate Of John A. O'Brien On June 2, 1949.

On February 24, 1949, counsel for Mrs. Smith filed a "Motion for Rule", in the Jefferson County Court, against The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, who are the Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, to show cause why they should not file a final settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court. (Mrs. Smith's Exhibit No. 32, R. I—713a-715a.)

Honorable Horace M. Barker, the then presiding Judge of the Jefferson County Court, sustained the "Motion for Rule", and it was returnable on March 1, 1949, and issued a summons and same was executed on E. P. Muir, Vice-President of The Louisville Trust Company, and L. L. Daugherty, Vice-President of the Citizens Fidelity Bank and Trust Company. (Exhibit No. 32, R. I—715a-717a.)

Without notice to Mrs. Smith or her counsel, the Trust Companies' Joint Administrators counsel, Irvin Marcus, of Davis, Boehl, Viser & Marcus, and R. Lee Blackwell, of Bullitt, Dawson & Tarrant, obtained an extension of time to March 21, 1949, in which to answer the Rule Issued against them requiring the filing of a Final Settlement of the O'Brien Estate, and an Order was entered on February 28, 1949. (Exhibit No. 32, R. I—718a-719a.)

The sixty (60) days allowed by the Jefferson Circuit Court in which to file an appeal from the Final Order and Judgment of the Jefferson Circuit Court of December 15, 1948, (filed in the first settlement suit) which was in conformity with the Court of Appeals' Opinion Supra, overruling the Motion of the Joint Administrators, to file an amended Petition in their first trumped-up settlement suit, had already elapsed by February 24, 1949.

4. March 18, 1949—April 17, 1951

Joint Administrators Second Settlement Suit Of The Estate Of John A. O'Brien In The Jefferson Circuit Court And The Court Of Appeals Of Kentucky Granted Mrs. Smith A Permanent Injunction Against The Joint Administrators Enjoining Them From Prosecuting Their Second Settlement Suit Of The Estate Of John A. O'Brien, In The Jefferson Circuit Court.

During the extension of time which the Joint Administrators obtained from the Jefferson County Court to

answer the Rule Issued against them, they sought and were granted from the Clerk of the Court of Appeals of Kentucky, on March 18, 1949, the right of a second Appeal in their first trumped-up settlement suit in the Court of Appeals of Kentucky.

On March 21, 1949, three days later, the Joint Administrators obtained from the Jefferson County Court a second extension of time in which to answer the "Rule Issued" against them, and on March 31, 1949, filed a second trumped-up settlement suit of the Estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, No. 313-655, with a fifty-three (53) page Printed Petition. (Exhibit No. 32, R. I—718a-719a.)

On April 1, 1949, the Joint Administrators filed in the Jefferson County Court their "Response to Rule", issued against them on February 24, 1949, and in the said Response they contended, as grounds for not complying with the "Rule Issued" and for not filing a final settlement of the O'Brien estate in the Jefferson County Court, that they now had pending in the Jefferson Circuit Court, a second settlement suit of the Estate of John A. O'Brien, deceased, No. 315-655. (Exhibit No. 32, R. I—719a-722a.)

On April 6, 1949, the Joint Administrators filed a "Memorandum In Support Of Their Response To Rule", in the Jefferson County Court, and gave as further grounds for not filing a final settlement of the O'Brien Estate in the Jefferson County Court,

(1) That they had a Second Appeal pending in their first Settlement Suit, filed on March 18, 1949,

(2) That on March 31, 1949, that the Joint Administrators had filed a Second Settlement Suit in the Jefferson Circuit Court, and they filed a copy of their Second Appeal

in their First Settlement Suit. (Exhibit No. 32, R. I—722a-734a.)

On April 6, 1949, counsel for Patricia R. Smith filed a "Reply To Response Of Trust Companys To Motion For Rule Against Them To Settle The Accounts Of The Estate of John A. O'Brien." (Exhibit No. 32, R. I—735a-752a.)

On April 6, 1949, counsel for Mrs. Smith also filed a Motion in The Jefferson County Court that the Joint Administrators be required to invest the Forty Thousand Dollars ($40,000.00) cash, belonging to the O'Brien Estate, of which Mrs. Smith is the sole beneficiary, on which they had been holding since June, 1946, on which they had not accounted to the O'Brien estate or Mrs. Smith for any interest thereon, and the Twenty-Five Thousand Dollars ($25,000.00) cash belonging to the O'Brien Estate and Mrs. Smith, which the Joint Administrators had been holding since February 11, 1936, on which they had not accounted to the O'Brien Estate or Mrs. Smith for any interest. (Exhibit No. 32, R. I—753a-755a.)

On April 14, 1949, Mrs. Smith filed a reply to Trust Company, Co-Administrators' Memorandum, in support of their response to Motion for Rule against them to settle, the Estate of John A. O'Brien, deceased. (Exhibit No. 32, R. I —755a-769a.)

On April 22, 1949 Mrs. Smith filed a memorandum with five exhibits in support of Motion to Require Trust Com-

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Mrs. O'Brien-Smith's Exhibits No. 32 and 33, are certified copies of the Transcript of Record from the Jefferson County Court No. 24,146 in the Estate of John A. O'Brien, deceased, from January 24, 1934 through October 1, 1951, and consists of pages 678a through 1092a, of Volume 1, Printed Transcript of Record, which were filed in the within action by order of the District Court on August 28, 1959. The Transcript of Record references will be referred to as above referred in the remainder of this Petition For Writ of Certiorari.

panies to invest Forty Thousand Dollars ($40,000.00). (Exhibit No. 32, R. I—770a-858a.)

"Exhibit No. 1—Notice and Motion (filed in the Court of Appeals) Motion to Set Aside Granting of Appeal by Clerk of The Court of Appeals to The Louisville Trust Company and The Citizens Fidelity Bank and Trust Company, Co-Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, and Motion to Dismiss the Appeal in the Above Styled Case and Quash Summons Thereon."

"Exhibit No. 2—Notice and Motion (filed in the Court of Appeals on April 20, 1949) to Quash the Return on the Summons Attempted to Be Served on Defendant, Patricia R. Smith, On April 1, 1949."

"Exhibit No. 3—Affidavit in Support of Motion to Quash Summons of Patricia R. Smith, Defendant herein, by Walter B. Smith, Filed and Entered."

"Exhibit No. 4—Affidavit in Support of Motion to Quash the Return on and the Summons Attempted to be Served on Defendant, Patricia R. Smith, on April 1, 1949, by Howard Tribble. Filed and Entered."

"Exhibit No. 5—Certified Copy of Transcript of Record from Jefferson Circuit Court on Co-Administrators Second Appeal, to Court of Appeals in their First Settlement Suit No. 250-301, in Jefferson Circuit Court, Consisting of Thirty-Three (33) Pages. Filed in Court of Appeals, April 11, 1949. Filed and Entered."

On April 22, 1949, the Joint Administrators filed a Response to Motion to require them to invest cash in the Estate of John A. O'Brien, deceased, and they gave no reason for not investing the cash held by them since 1936, belonging to Mrs. Smith. (Exhibit No. 32 R. I—860a-862a.)

On April 25, 1949, counsel for Mrs. Smith filed a Petition for a Permanent Injunction in the Jefferson Circuit

Court, No. 313-986, to enjoin the Trust Companies from prosecuting their Second Trumped-Up Settlement Suit of the Estate of John A. O'Brien, deceased, which they filed on March 31, 1949. (Exhibit No. 32, R. I—853a-858a.)

Said Petition was dismissed, and counsel for Mrs. Smith filed an appeal to the Court of Appeals of Kentucky on May 20, 1949, (which she won on March 6, 1951) and made a Motion for a Temporary Injunction until the Petition for a Permanent Injunction would be ruled upon. Said Motion was sustained, Mandate issued and Order entered. Mrs. Smith won that appeal on March 6, 1951, the Court of Appeals of Kentucky granted her a permanent Injunction against the Joint Administrators from ever filing another Settlement Suit in the Estate of John A. O'Brien, in the Jefferson Circuit Courts. See *Patricia R. Smith* v. *The Louisville Trust Company and Citizens Fidelity Bank and Trust Company*, 237 S.W. (2d) 836, (March 6, 1951), Rehearing denied April 17, 1951. In that case it held:

> "Suit by Patricia R. Smith to enjoin the Louisville Trust Company, and others, coadministrators of John A. O'Brien, deceased, from further prosecuting a second so-called settlement suit in the Jefferson Circuit Court. The Circuit Court, Chancery Branch, Second Division, Jefferson County, W. Scott Miller, J., dismissed plaintiff's petition and overruled her motion for reconsideration of the petition, and plaintiff appealed. *The Court of Appeals, Van Sant, C., held that the matter had been unreasonably prolonged and that since two former opinions of the Court of Appeals had directed the coadministrators to make final settlement in the County Court, the court below should have permanently enjoined the further prosecution of the second settlement suit.*
>
> Reversed with directions."
>
> "Upon return of the above case to the circuit court, the co-administrators tendered an amended petition.

Objection being entered thereto the court refused permission to file same but permitted the tendered amendment to be made a part of the record. The co-administrators then appealed to this court."

"Soon *thereafter and while this second appeal was pending, this second action was filed in the Jefferson Circuit Court* seeking a settlement of the estate of John A. O'Brien, deceased. In the second appeal above the judgment was afterwards affirmed. Louisville Trust Co. v. Smith, 313 Ky. 15, 230 S.W. 2d 64." (1950)

"(1) It appears to be the position of the co-administrators that as long as there remain disputed questions they are entitled to bring action in the circuit court for the settlement of the estate. The more fact that there are disputed matters and possibly questions that should be litigated, is not qualification for a settlement suit in the circuit court. One of the basic requirements for such suit is that there be not sufficient personal estate for payment of the debts."

"It will be noted that this second attempted settlement suit was filed while the second appeal in the first action above was in the process of appeal. The averments of the first action failed to meet the requirements of 429 of Civil Code of Practice. The tendered amendment, which was the subject of the second appeal, also failed in this respect. *There could be no possible end to litigation should a party be permitted to file a series of attempted settlement suits.*"

"Since this matter has been before us, another case has come and gone which had to do with the filing of a settlement of this estate in the county court, in which appellees claimed to have made a purported final settlement, subject to a few questions yet to be determined. *Again we say this matter has been unreasonably prolonged.*"

"*The way has been opened and is now open for the final settlement in county court.* Under two former opinions of this court appellees have been directed to

make final settlement in the county court. Further unnecessary delay will be inexcusable."[2]

"(2) The court below should have permanently enjoined the further prosecution of this second settlement suit."

"The judgment is reversed for entry of judgment consistent herewith."

On May 5, 1949, Honorable Horace M. Barker, Judge of the Jefferson County Court, after considering the Trust Companies' delaying tactics for not filing a final settlement of the O'Brien Estate, rendered an Opinion and made the "Rule Issued" against the Joint Administrators absolute, and ordered and directed them to file a final settlement of the Estate of John A. O'Brien, deceased, in Jefferson County Court within sixty (60) days thereafter. (Exhibit No. 32, R. I—870a-872a).

On May 19, 1949, counsel for Mrs. Smith filed a motion for reconsideration of the time given the Joint Administrators to file the said final settlement of the O'Brien Estate in Jefferson County Court and arguments were had thereon by both counsel for the Joint Administrators and counsel for Mrs. Smith. (Exhibit No. 32, R. I—872a-878a).

On May 19, 1949, the Joint Administrators filed a "Response To motion (of Mrs. Smith") (Filed on May 19, 1949), and again the Joint Administrators argued as an excuse for not filing a final settlement of the O'Brien Estate that they had a second settlement suit pending in the Jefferson Circuit Court, and they filed a copy of their fifty-three (53) page printed Petition, filed in Jefferson Circuit Court on March 31, 1949, as an Exhibit, with a copy of their thirty-eight (38) page Receipts and Disbursements that was filed with said Petition, in Jefferson Circuit Court

on March 31, 1949, and *they wrote a brief stating that as long as their Second Appeal was pending on the first settlement suit, and the second settlement suit was pending in the Jefferson Circuit Court, any steps taken in the Jefferson County Court would be void.* (Exhibit No. 32, R. I—879a-929a).

Arguments were had thereon by both counsel for Mrs. Smith and counsel for the Joint Administrators.

The Motion of Mrs. Smith was sustained and the time in which the Joint Administrators was given to answer the "Rule Issued" against them, was reduced thirty (30) days, and they were ordered to answer on June 5, 1949, and an Order was entered by the Honorable Franklin Fitch, Judge Pro Tem. (Exhibit No. 32, R. I—930a).

On May 26, 1949, the Joint Administrators filed an appeal from the "Rule Issued" against them and from the two Orders of the Jefferson County Court to the Jefferson Circuit Court, and issued a supersedeas on the Honorable Horace M. Barker, Judge of the Jefferson County Court, staying all proceedings in the final settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court, which further ordered the Clerk of the Jefferson County Court, to bring to the Clerk of the Jefferson Circuit Court on their appeal, all of the original records and papers in the John A. O'Brien Estate, which were in the Office of the Clerk of the Jefferson County Court. (Exhibit No. 32 R. I—931a-932a). Thus preventing a final settlement in County Court until said records were returned—they were never returned, they were lost or stolen and they were not legally restored until October 1954, by the ruling and an opinion of the Court of Appeals of Kentucky.

5. 1950-1952

The Joint Administrators Exparte Proceedings In The Jefferson County Court On Their Purported Final Settlement Of The Accounts Of The Estate Of John A. O'Brien.

On June 21, 1950, the Citizens Fidelity Bank and Trust Company, and The Louisville Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, filed a thirty-seven (37) page printed Petition for the settlement of and a partial settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court, and asked therein for a money Judgment against Patricia O'Brien-Smith, and further sought therein six other claims for four (4) law firms and the two Joint Administrators, and without specifying the amounts and without filing claims for said fees, and affidavits in support thereof, as required by law. Said Petition was entitled. "Their Account and Final Settlement of the Execution of Their Trust." Said Petition was signed by Irvin Marcus, and Davis, Boehl, Viser and Marcus, counsel for The Louisville Trust Company; and William Marshall Bullitt, R. L. Blackwell and Bullitt, Dawson & Tarrant, counsel for Citizens Fidelity Bank and Trust Company. Said Petition was verified by L. L. Daugherty, Vice-President of the Citizens Fidelity Bank and Trust Company, one of the Joint Administrators, but the said Petition was not verified by any officer for The Louisville Trust Company, the other Joint Administrator, as required by law in the final settlement of an estate in Kentucky. (R. I—46a-98a).

Filed with said Petition of the Joint Administrators was two Exhibits namely: Exhibit "A," which consists of forty-one (41) typewritten legal size pages which has no title, but upon examination discloses that it is a purported statement of accounts of receipts and disbursements of the

estate of John A. O'Brien, deceased, from the day of the Joint Administrators were appointed, on March 1, 1934, to June 1, 1950. Said Exhibit was not signed or verified by any officer of either Trust Company, or any attorney on behalf of either Trust Company, as required by law. (Mrs. Smith's Exhibit No. "D," R. I—233a-306a).

Also attached to said Petition of the Joint Administrators was an Exhibit "B" which consists of "Vouchers", consisting of over three hundred and twenty-six (326) pages, and vouchers. (This was not copied or filed in the within action because it would have been too costly.)

No summons was, or has ever been served upon Patricia O'Brien-Smith, and she did not learn that such Petition, or Exhibits had been filed in the Jefferson County Court until June 29, 1950.

On July 1, 1950, Mrs. Smith filed in the Jefferson County Court, a "Motion for Extension of Time to File Exceptions and Answer", or plead therein by Patricia O'Brien-Smith, the sole beneficiary of the estate of John A. O'Brien, deceased, notice of which was duly served on William Marshall Bullitt, of Bullitt, Dawson & Tarrant, and Irvin Marcus, of Davis, Boehl, Viser & Marcus, counsel for the Joint Administrators. Filed with said Notice and Motion was two affidavits of Walter B. Smith in support thereof, additional grounds for said Motion, a copy of the mandate and the Opinion of the Court of Appeals of Kentucky by Commissioner Morris, rendered on May 16, 1950, in favor of Patricia OBrien-Smith, Supra, (Exhibit No. 33, R. I—946a-960a).

The Opinion of the Court of Appeals of Kentucky of May 16, 1950, affirming the Jefferson Circuit Court's Order and Judgment of December 15, 1948, which was in favor of Mrs. Smith, wherein the Jefferson Circuit Court overruled the

Motion of the Joint Administrators to file an amended Petition in their first trumped-up settlement suit of the Estate of John A. O'Brien, deceased, filed in Jefferson Circuit Court on February 18, 1937, which Mrs. Smith *had already won on the first Appeal to the Court of Appeals of Kentucky* on June 8, 1948, a copy of said opinion and mandate was filed in the Jefferson County Court. (Exhibit No. 33, R. I—961a-965a).

Arguments were had by counsel for both Mrs. Smith and the Joint Administrators before County Judge Boman L. Shamburger, and the Motion for an extension of time was sustained, and an Order was entered on July 3, 1950, extending the time to August 7, 1950, (R. I—965a-966a).

After examination of the Joint Administrators' Petition and Exhibits "A" and "B", filed therewith, it was apparent that it was not and is not, a final settlement of the Estate of John A. O'Brien, deceased, as required by law and that it is only a partial settlement of the said estate, and that in the Petition and Prayer of said Petition, the Joint Administrators sought to recover from Mrs. Smith a money Judgment, without specifying what amount they sought to recover from her, or on what basis they made such a claim. Since it was not a final settlement of the John A. O'Brien Estate by law, Mrs. Smith was not required to answer or plead therein, in the Jefferson County Court.

Further, any steps which were taken, or would have been taken by Mrs. Smith in the Jefferson County Court pertaining to the settlement of the estate of John A. O'Brien, deceased, between May 26, 1949, and October, 1954, would have been void ab initio.

On August 7, 1950, Mrs. Smith filed her Objections and we quote:

"(1) Objection Of Patricia R. Smith (Sole Beneficiary Of The Estate Of John A. O'Brien, Deceased), To This Court, Or Any Commissioner, Confirming, or Approving, Or Hearing Any Proof On Any Item Contained In The Periodical, Or Partial Settlement Of The Estate Of John A. O'Brien, Deceased, Filed Herein, On June 21, 1950, By The Louisville Trust Company, And The Citizens Fidelity Bank and Trust Company, Co-Administrators, With The Will Annexed Of The Estate Of John A. O'Brien, Deceased, And Called, 'Their Account And Final Settlement Of The Execution Of Their Trust'.

"(2) Motion To Require The Co-Administrators Of The Estate Of John A. O'Brien, Deceased, To File A Final Settlement Of The Estate Of John A. O'Brien, Deceased, In Compliance With The Kentucky Revised Statutes And Rulings Of The Court Of Appeals On The Settlement Of This Estate, And That Both Of The Co-Administrators Be Required To Sign A Sworn Affidavit Thereto.

"(3) Motion That Time Be Extended for the Filing Of Exceptions And Objections And Answer, Until The Co-Administrators File A Final Settlement Of The Estate Of John A. O'Brien, Deceased, And Sign An Affidavit Thereto, And Until The Co-Administrators Are Required To Dismiss The Second 'Trumped-Up' Settlement Suit Now Pending In The Jefferson Circuit Court, And Their Appeal From The Order Of The Jefferson County Court Now Pending In The Jefferson Circuit Court." (Exhibit No. 33, R. I—967a-975a).

As will be noted from the above heading, Mrs. Smith did not file a Motion for a further extension of time in which to file exceptions, objections and answer to the Joint Administrators partial settlement of accounts. Nor did she ever at any time state, or call what the Joint Administrators have filed, a final settlement of the Estate of John A. O'Brien, deceased, but by the pleading she filed on August 7, 1950,

it will be noted it was an objection to the Jefferson County Court, the Judge, or any commissioner who may be appointed, ever considering the partial settlement filed by the Joint Administrators, being a final settlement of the O'Brien Estate, and Mrs. Smith filed a Motion that the Judge of the Jefferson County Court require the Joint Administrators of the Estate of John A. O'Brien, deceased, to file a final settlement of the estate of John A. O'Brien, deceased, in compliance with the Kentucky Revised Statutes and Rulings of the Court of Appeals of Kentucky, on the settlement of the O'Brien Estate, and that both of the Joint Administrators be required to file a sworn affidavit thereto, as required by Kentucky law.

Mrs. Smith further filed a "Motion That Time Be Extended for the Filing of Exceptions, Objections and Answer, until the Co-Administrators would file a Final Settlement of the Estate of John A. O'Brien, Deceased, and Until They Would File an Affidavit Thereto, and Until the Co-Administrators Are Required to Dismiss Their Second Trumped-up Settlement Suit of the O'Brien Estate Now Pending in the Jefferson Circuit Court, and the Co-Administrators' Appeal from the Orders of the Jefferson County Court of May 5 and 19, 1949, now pending in the Jefferson Circuit Court", and cited the following cases to uphold her contention: *Deming* v. *Paynter*, 42 S.W. 1112; *Andrews* v. *McCarty*, 208 Ky. 25, 270 S.W. 466. (Exhibit No. 33, R. I—967a-975a).

Mrs. Smith did not get another extension of time on August 7, 1950, as stated by the Joint Administrators. There was no hearing had on the above objections and Motions on August 7, 1950. The hearing was passed to August 22, 1950, by an Order entered by Thomas Young trial commissioner.

On August 22, 1950, a hearing was had before County Judge Boman L. Shamburger, on the objections and mo-

tions filed on August 7, 1950, and on August 22, 1950, Mrs. Smith filed a "Notice and Motion to Strike from the record of the O'Brien estate, the purported final settlement of the estate of John A. O'Brien, deceased, consisting of a thirty-seven (37) page historical brief or petition, which contained many unfounded and unwarranted statements. It did not comply with the Kentucky Revised Statutes for a final settlement of an estate in County Court, and it is prejudicial to the substantial rights of the sole beneficiary, Patricia R. Smith" and in the first paragraph of that Motion it specifically states that, "*Said Motion was made without entering her appearance herein and that she specially moves the Court to strike from the record of this Estate the so-called final settlement* of this estate and filed with the co-administrators purported final settlement of the estate of John A. O'Brien, deceased, filed in this Court (Jefferson County Court) on June 21, 1950, the co-administrators thirty-seven (37) page historical brief or petition." (Exhibit No. 33, R. I—977a-982a).

Arguments were had by both counsel for Mrs. Smith and counsel for the Joint Administrators, whereupon the Judge of the Jefferson County Court failed and refused to rule on said Motions, and referred the so-called settlement of the estate of John A. O'Brien, deceased, to A. Scott Hamilton, special commissioner, and entered an order to that effect. (Exhibit No. 33, R. I—983a-984a.)

On September 1, 1950, Mrs. Smith filed "Notice and Motion for Reconsideration of the Three (3) Motions and Objections Filed by Counsel for Patricia R. Smith on August 7, 1950, and her Notice and Motion To Strike filed on August 22, 1950, and Motion to Set Aside the Order Entered by This (Jefferson County) Court on August 22, 1950." Wherein said commissioner was appointed to hear and make recommendations in the partial settlement of the

Estate of John A. O'Brien, deceased. (Exhibit No. 33 R. I —985a-991a.)

Arguments were had thereon by both counsel for Mrs. Smith, and counsel for the Joint Administrators. The Judge of the Jefferson County Court did rule on September 8, 1950, and he overruled Mrs. Smith's objection to the partial settlement of the estate being considered a final settlement of the estate, and overruled Mrs. Smith's Motion to require the Joint Administrators to file a final settlement of the estate, and the Motion to strike, and entered three separate orders thereon on September 8, 1950. (Exhibit No. 33, R. I —991a-997a.)

6.

A Stay Of All Proceedings In The Settlement Of The Estate of John A. O'Brien, Deceased, Was Granted By The Court Of Appeals Of Kentucky From October 3, 1950, Until May 11, 1951.

On October 3, 1950, before any hearings were had before the appointed Commissioner, A. Scott Hamilton, on the Joint Administrators' partial settlement of the Estate of John A. O'Brien, deceased, Patricia O'Brien Smith filed a petition for a Writ of Mandamus in the Court of Appeals of Kentucky, against County Judge Boman L. Shamburger, requesting the Court of Appeals to command County Judge Boman L. Shamburger to require the Joint Administrators to file a proper final settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court, in compliance with the Kentucky Revised Statutes for the settlement of an estate in Kentucky, and in compliance with the Court of Appeals' two opinions and mandates on the John A. O'Brien Estate, supra.

The Order and Judgment of December 15, 1948, of the Jefferson Circuit Court, in conformity with said Opinion,

and in compliance with the Rule Issued and made absolute against the Joint Administrators, by Honorable Horace M. Barker, County Judge then presiding, and Honorable Franklin Fitch, Judge pro tem, of the Jefferson County Court, on May 5, 1949, and May 19, 1949.

On October 3, 1950, the Court of Appeals of Kentucky entered an Order sustaining the Motion for a Temporary Stay of all proceeding in the Jefferson County Court on the partial settlement of the O'Brien Estate until the merits of the Petition for a Writ of Mandamus would be ruled upon by the Court of Appeals.

On October 4, 1950, Mrs. Smith filed a Motion in the Jefferson County Court to File an Order of the Court of Appeals, Granting a Temporary Stay of All Proceedings in the Settlement of the Estate of John A. O'Brien, deceased. (Exhibit No. 33, R. I—998a-1002a.)

On January 26, 1951, the Court of Appeals of Kentucky overruled Patricia O'Brien Smith's Petition for Writ of Mandamus and rendered an Opinion. *Smith* v. *Shamburger, Judge*, 314 Ky. 850; January 26, 1951; Rehearing denied, May 11, 1951. The Opinion stated:

> "In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court; (1) A settlement suit filed April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former judge of Jefferson County Court, directing the Co-administrators to settle the estate. There has been no final disposition of either of these cases. If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement."

The opinion in effect held that as long as the Joint Administrators' Second settlement suit of the O'Brien estate, in the Jefferson Circuit Court was pending, as long as the Joint Administrators' appeal was pending in the Circuit Court from the "Rule Issued" against them to file the final settlement of the O'Brien Estate in County Court, that the accounting they had filed in the County Court on June 21, 1950, was not a final settlement of the O'Brien Estate.

7. The Opinion rendered on the Writ of Mandamus did not hold that the Joint Administrators had filed a proper final settlement of the Estate of John A. O'Brien, deceased, in Jefferson County Court, but in effect held that the Petition for Writ of Mandamus should have been filed in the Jefferson Circuit Court and was not properly before the Court of Appeals of Kentucky, and cited cases holding to this effect. (Exhibit No. 33, R. I—1002a-1009a.)

On February 26, 1951, counsel for Patricia O'Brien Smith filed in the Court of Appeals of Kentucky a Motion for an extension of time to file a Petition for Rehearing on the Opinion filed on January 26, 1951, on the Writ of Mandamus, and the said Motion was sustained and time for filing said Petition for a rehearing was extended to and including March 30, 1951.

On March 30, 1951, Patricia O'Brien-Smith filed a Petition for rehearing on the Opinion on the Writ of Mandamus.

On May 11, 1951, the Petition for rehearing on the Writ of Mandamus was overruled and Mandate issued on May 11, 1951.

So by the above stated history of the pleadings filed in the Court of Appeals of Kentucky from October 3, 1950, through May 11, 1951, it clearly shows that the proceedings on the partial settlement of the estate of John A. O'Brien,

deceased, were held in abeyance by the Order of the Court of Appeals of Kentucky of October 3, 1950.

Counsel for Mrs. Smith had learned that all of the original records and papers of the John A. O'Brien Estate brought to the Office of the Clerk of the Jefferson Circuit Court, on the Appeal filed thereon, on May 26, 1949, by the Joint Administrators were lost or stolen from the Clerk's office.

Immediately, upon discovering that the entire record of the O'Brien Estate was missing from the Office of the Clerk in the Jefferson Circuit Court, counsel for Patricia O'Brien-Smith filed in Jefferson County Court, on July 11, 1951, a "Motion that neither the Judge nor a Commissioner of this Court (Jefferson County Court) will hear proof for or against any item in the purported settlement of accounts of the Joint Administrators until thirty (30) days after the entire original record or a certified copy thereof of the O'Brien Estate is returned to the County Court." (Exhibit No. 33, R. I—1014a-1017a.)

On July 11, 1951, the Judge of the Jefferson County Court refused to rule on said Motion and referred same to A. Scott Hamilton, the appointed Commissioner. (Exhibit No. 33, R. I—1017a-1018a.)

On July 13, 1951, Patricia O'Brien-Smith filed a Petition for a Temporary Injunction in the Jefferson Circuit Court to enjoin the Jefferson County Court, Boman L. Shamburger, County Judge, and A. Scott Hamilton, Commissioner, from proceeding with hearings on the partial settlement of the Estate of John A. O'Brien, deceased, until thirty (30) days after the forty-one (41) original records and papers of the O'Brien Estate, or a certified copy of same were found and returned to the Jefferson County Court. A Temporary Restraining Order was granted by

the Judge of the Jefferson Circuit Court, and summons was served on July 12, 1951, on the Jefferson County Court, Boman L. Shamburger, County Judge, and A. Scott Hamilton, Commissioner, with a Notice of Judge Speckman's Temporary Restraining Order. There was filed in the Jefferson County Court, on July 13, 1951, a carbon copy of the Petition for a Temporary Injunction which had been filed in the Jefferson Circuit Court, No. 329,007, a carbon copy of the affidavit attached thereto, a carbon copy of Judge Speckman's Temporary Restraining Order, and a carbon copy of the Order pertaining to the restoration of the lost or stolen records wherein Commissioner John O. Arnold of the Jefferson Circuit Court was appointed for the purpose of replacing and supplying authentic and certified copies of all of the forty-one (41) original records and papers of the O'Brien Estate, listed in the Office of the Clerk of the Jefferson Circuit Court, in Rule Docket Book #315, Case No. 314,574 (the Trust Companies' Appeal from the "Rule Issued" against them), and on pages 19 and 20 of said Book. (Exhibit No. 33, R. I—1018a-1038a.)

On July 23, 1951, Honorable Lawrence F. Speckman of the Jefferson Circuit Court overruled the Motion and Petition for a Temporary Injunction of Patricia O'Brien-Smith and entered an Order to that effect.

On July 26, 1951, counsel for Patricia O'Brien-Smith filed a Motion for a Temporary Injunction in the Court of Appeals of Kentucky for a Stay of all proceedings on the partial settlement of the Estate of John A. O'Brien, deceased, in the Jefferson County Court, until thirty (30) days after authentic and certified copies of the forty-one (41) original records of the O'Brien Estate were restored and filed in the Jefferson County Court, from where they were removed by the Joint Administrators on May 26, 1949.

The Court of Appeals of Kentucky granted a Temporary Stay of all proceedings in the Jefferson County Court on the partial settlement of the Estate of John A. O'Brien, deceased, until the merits of the Petition for Temporary Injunction should be ruled upon, and the following Order was entered on July 26, 1951. We quote from said Order, which is as follows:

"Court Of Appeals Of Kentucky

Before Hon. James W. Cammack, Chief Justice, or Any Judge of Court of Appeals.

No. 329,007. Jefferson Circuit Court,

Chancery Branch, 1st Division.

Patricia R. Smith Sole Beneficiary Of the Estate Of John A. O'Brien, Deceased, Plaintiff,

vs.

Jefferson County Court, Boman L. Shamburger, County Judge, and A. Scott Hamilton, Commissioner, Citizens Fidelity Bank And Trust Company, One of the Co-Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, Defendants.

"Order. At a Court Held July 26, 1951.

This cause having come on to be heard on motion of plaintiff for temporary injunction against the defendants for thirty (30) days after the forty-one (41) original papers of the O'Brien Estate are restored to the Jefferson County Court and establish as part of the record in lieu of the lost originals, arguments were heard by both counsel for the plaintiff and counsel for the defendants, and the Court being sufficiently advised.

It Is Hereby Ordered that a stay of all proceedings and hearings in the O'Brien Estate No. 24.146 in the Jefferson County Court become effective immediately, and continue in effect until the merits of this motion

are ruled upon. It is further ordered that the plaintiff have five days until August 1, 1951, in which to file her brief herein and that the defendant have five days hereafter until August 7, 1951, in which to file their brief herein.

Filed July 26, 1951— /s/ BRADY M. STEWART,
Charles K. O'Connell." Judge."

(Mrs. Smith's Exhibit No. 33, R. I—1040a-1049a.)

The final Opinion from the Court of Appeals of Kentucky in favor of Mrs. Smith restoring the lost or stolen records according to law, as she requested in her appeal, was not rendered until on November 20th, 1953, in the case of Smith v. The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, 262 S.W. 2d 479, November 20, 1953, and the final order in conformity with the opinion legally restoring the records was not filed until October, 1954. The Opinion held:

"Certain original papers in matter of deceased's estate disappeared from the Jefferson Circuit Court, Chancery Branch, First Division, after they had been transmitted there on appeal from county court. The Jefferson Circuit Court, Lawrence F. Speckman, J., entered an order, and appeal therefrom was taken. The Court of Appeals, Cullen, C., held that where Circuit Court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, *carbon copies furnished should have shown, in type form, any signatures that were on the originals.*"

"Order reversed with directions."

"Mrs. Smith filed objections and exceptions to the report, *on the ground that the administrators and their attorneys should have been required to 'sign and certify' the copies furnished by them,* and that Mrs. Smith's attorney should have been permitted to 'sign

> and certify' the copies furnished by him and by Mrs. Smith. The court overruled the objections and entered an order which confirmed the report of the commissioner and found that the supplied papers were 'true, correct, and authentic copies' of the missing originals."
>
> "The order appealed from is reversed, with directions that the court, either directly or through its commissioner, take such further proof as may be necessary to *ascertain what signatures appeared upon the original papers, and cause such signatures to be typed upon the supplied copies.*"

The Opinion restoring the lost records legally was not rendered until one year and eight months after the so-called final Judgment of March 5, 1952, and the amended Judgment of May 1, 1952, were filed in the O'Brien estate in the Jefferson County Court.

The Joint Administrators and their attorneys refused to sign and certify the copies of the Inventory and other documents which they had originally filed in the O'Brien Estate in the office of the Clerk of the Jefferson County Court, to restore the O'Brien records.

They further objected to Counsel for Mrs. Smith signing and certifying the copies of the original papers and documents. which he supplied to restore the lost or stolen records in the O'Brien Estate, which he had originally filed.

Mrs. Smith, the sole beneficiary of the O'Brien Estate, appealed the case in order that all the missing records could be supplied and legally restored, if possible. The Court of Appeals, as shown above, reversed the case and required the Joint Administrators, and their attorneys to sign and certify all of the copies of the original papers which they supplied to restore the records.

The Court of Appeals opinion further ruled that counsel for Mrs. Smith, could sign and certify all of the copies of the original papers which he supplied to restore the papers which he had originally filed for Mrs. Smith in the O'Brien Estate in the Jefferson County Court.

From the foregoing steps which were taken in the Jefferson County Court by Mrs. Smith and in the Court of Appeals of Kentucky, it is crystal clear that she resorted to every step known to her to compel, by Court order, the Joint Administrators to file a final settlement of the Estate of John A. O'Brien in the Jefferson County Court, and in compliance with the Statutes and law of Kentucky, and to stop trumped-up expensive litigation, by the Joint Administrators and their attorneys.

Every contention that Mrs. Smith made was legally sound, and she was upheld in each and every one by the Courts of Kentucky as we have clearly shown, by the opinions quoted herein.

It should be borne in mind that the Joint Administrators held and hold themselves out as experts in the handling and settlement of estates. This record reveals that they were appointed on March 1, 1934, and are still Joint Administrators of the estate of John A. O'Brien. The first Partial Settlement was filed June 21, 1950, and one of the Joint Administrators, The Louisville Trust Company, never did sign or notarize this Partial Settlement.

After the Joint Administrators lost their first settlement suit in the Jefferson Circuit Court and their refusal to comply with the mandate of the Court of Appeals of Kentucky, they conjured up every legal suit and ruse known which reveals a pre-conceived planned pattern by the Joint Administrators and their attorneys among other things to first conceal all the facts surrounding the sale of the part-

nership interest owned by Mrs. Smith in the Edward J. O'Brien Tobacco Company and its four subsidiaries. Third, the continuous and incessant litigation to keep from finally settling the estate in order to have some excuse to charge exorbitant fees for legal services against the estate instead of for the estate. Fourth, in their last action or complaint filed the Joint Administrators are asking for additional fees still in the capacities of Joint Administrators.

It is for the foregoing litigation filed and caused to be filed by the Joint Administrators that the District Court awarded to the Joint Administrators and their attorneys by his order and Summary Judgments on November 9, 1962, the sum of $218,472.80, and the District Court (Judge W. Wallace Kent) refused to have a trial of the within action, and gave no legal reason for not having a trial.

8. The Judgment Of March 5, 1952 And The Amended Judgment Of May 1, 1952, Of The Jefferson County Court Was Obtained By Fraud By The Joint Administrators.

From December 17, 1951, to January 7, 1952, the Joint Administrators had their attorneys to put on a trial in the Estate of John A. O'Brien in the Jefferson County Court, before a Commissioner, which lasted ten days. Mrs. O'Brien-Smith was not present at any of their trial; there was no defendant there and there was not any attorney there to represent Mrs. Smith, only the Plaintiffs-Respondents, the Joint Administrators, and their attorneys and their witnesses were present.

THERE WAS NO PROOF FILED IN THE RECORD OF THE WITHIN ACTION, THAT MRS. SMITH OR ANY ATTORNEY ON HER BEHALF PARTICIPATED IN THE PROCEEDINGS IN THE O'BRIEN ESTATE IN THE JEFFERSON COUNTY COURT. THE JOINT AD-

MINISTRATORS ADMIT IN THEIR COMPLAINT THAT MRS. SMITH DID NOT FILE ANY EXCEPTIONS IN THE JEFFERSON COUNTY COURT TO THEIR PURPORTED FINAL SETTLEMENTS OF THE ACCOUNTS OF THE ESTATE OF JOHN A. O'BRIEN. We again wish to call this Court's attention to the fact that the Joint Administrators did not file in the within action, any testimony, depositions or exhibits of any kind or description from the trial they put on in the Jefferson County Court, or from the Rescission Suit which was filed by Mrs. Smith against the brothers of John A. O'Brien, in fact there was not any testimony of any witnesses or depositions from any of the law suits in the O'Brien Estate filed in the within action except the one deposition of Edward C. Wirotzious consisting of fifty-two typewritten pages, filed on behalf of Mrs. Smith by Order of the District Court on August 28, 1959. (Exhibit No. 35, R. I—1232a-1277a.)

THE FOURTEEN QUESTIONS PRESENTED TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

On the Petitioner Mrs. Smith's Appeal, to the Circuit Court of Appeals there were fourteen questions presented for that Courts' consideration, but they failed and refused to rule on ten of those questions. The questions thus presented were:

I. The District Court Erred In His Findings Of Fact Which Are Not Based On Substantial Evidence And Are Not Binding Because They Are Clearly Erroneous, And In Refusing To Grant A Trial Of This Action.

II. The District Court Erred In Refusing To Have A Trial Of This Action And The Issues Involved In The Sale By The Joint Administrators Of Patricia R. O'Brien-Smith's Twenty Three And Seventy Seven One Hundredths Per Cent (23.77%) Partnership Interest In The Edward J. O'Brien Tobacco Company And Its Four Subsidiaries, For Less Than One Third Of Its Market Value And In Violation Of The Terms Of The Partnership Agreement.

III. The District Court Erred In His Ruling That The Issues Presented By Mrs. Smith's Original Counterclaim Are Barred By The Statute Of Limitations.

IV. The District Court Erred In Denying Mrs. Smith A Trial On The Issues Of Her Counterclaim As A Defense Against Claims Asserted By Joint Administrators For Their Fees And Fees For Their Attorneys.

V. The District Court Erred In Ruling That Mrs. Smith Is Barred From Asserting The Claims Set Forth In Her Original Counterclaim And That The Claims Asserted Are Barred By The Rule Of Res Judicata.

VI. The District Court Erred In Granting The Plaintiffs' Joint Administrators' Motion For Leave To File An Amended Reply To The Defendant's (Mrs. O'Brien-Smith's) First Counterclaim.

VII. The District Court Erred In Granting The Plaintiffs' Joint Administrators' Amended Motion For Summary Judgment As To The Defendant's (First) Counterclaim.

VIII. The District Court Erred In Denying Mrs. Smith's Motion For Leave To File Her First Amended Answer And Amended Counterclaim, Surcharging The Joint Administrators Settlements Of Accounts—And On Bond Of The Estate Of John A. O'Brien.

A. The District Court Erred In Holding That The United States District Courts Have No Jurisdiction Over Probate Matters.

B. The District Court Erred In Holding That The Defendant Mrs. Smith Is Precluded From Surcharging The Joint Administrators Settlements Of Accounts Of The Estate Of John A. O'Brien.

(1) The District Court Erred In Holding That "Whether The Defendant (Mrs. Smith) Took Part In The Proceedings In Connection With The Settlement Of That Account As Required By The Kentucky Statutes."

(2) The District Court Erred In Holding That "She (Mrs. Smith) Took All Possible Steps To Prevent The Settlement Of The Account. It Would Appear That She Had No Objections To Such Accounting, As Such."

(3) The District Court Erred In Holding That "It Appears From The Record That The Defendant (Mrs. Smith) Participated To A Substantial Extent, In The Proceeding Leading To Approval Of The Final Account, By Using Every Remedy Available To Prevent The Consideration And Determination Of The Final Account Filed By The Plaintiffs-Administrators."

(4) The District Court Erred In Holding "That The Defendant (Mrs. Smith) Took Part In And Participated In The Settlement Of The Final Account Within The Meaning Of The Kentucky Law."

C. The District Court Erred In Ruling That Mrs. Smith's Remedy Was By An Appeal From The Order And

Judgment Of The Jefferson County Court Of March 5, 1952, And The Amended Judgment Of May 1, 1952, To The Jefferson Circuit Court, And That The Said Judgment And Amended Judgment Was A Final Order.

IX. The District Court Erred In Denying The Defendant-Appellant Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer And Her Second Amended Counterclaim (Filed On May 15, 1961).

X. The District Court Erred In Overruling Defendant's (Mrs. O'Brien-Smith's) Motion For An Order Requiring The Joint Administrators To Pay Into The District Court The Remaining Cash Assets Held By Them And Belonging To The O'Brien Estate.

XI. The District Court Erred In Failing To Require The Joint Administrators To Pay Interest Compounded At The Rate Of 6% Per Annum On Cash Retained By Them Belonging To Mrs. Smith Since 1936.

XII. The District Court Erred In Overruling The Motion Of Defendant Mrs. Smith To Bar William Marshall Bullitt And All Other Members Of The Law Firm Of Bullitt, Dawson & Tarrant From Representing The Louisville Trust Company And The Citizens Fidelity Bank & Trust Company, The Joint Administrators, Against Her In The Within Action, Because They Represented Mrs. Smith From January 1934 To February 12, 1936.

XIII. The District Court Erred In Its Order And Summary Judgments In Allowing Interest On The Joint Administrators Fees, And Their Attorneys Fees On Their Alleged Over-Payments To Mrs. Smith, Filed And Entered On November 9, 1962.

XIV. The District Court Erred In Granting The Joint Administrators Motion For Summary Judgments By Its Order And The Summary Judgments Filed And Entered On November 9, 1962, Allowing Them The Amount Of $218,472.80.

REASONS FOR GRANTING THE WRIT

1. In deciding that the issue of the sale of Mrs. O'Brien-Smith's interest in the partnership of Edward J. O'Brien Tobacco Company and its four subsidiaries by the Trust Companies, was barred by the proceedings in a Rescission Suit, which was against only the brothers of John A. O'Brien, the Court of Appeals decided an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

One of the main questions in this action which was decided by the United States Court of Appeals for the Sixth Circuit, which was the issue raised by, and set out in the Trust Companies' (the joint administrators of the Estate of John A. O'Brien) Complaint, is the sale made by the Trust Companies of the twenty-eight and thirty-three one hundredths (28.33%) per cent interest in the partnership in the Edward J. O'Brien & Company, (one of the largest independent tobacco brokers in the world), owned by the Defendant Patricia R. Smith, which the Trust Companies sold for less than one third of its market value. The said issue was fully answered and controverted by the Defendant Patricia R. Smith, in her answer and counterclaim filed in the within case on November 12, 1956. On this issue the District Court refused to have a trial, or permit any testimony to be introduced, and the Court of Appeals, upheld the District Court in this ruling.

The Trust Companies were granted the right by the District Court, which was upheld by the Circuit Court of Appeals, to file an Amended Reply to Mrs. Smith's (First) Counterclaim, consisting of one hundred sixty-five (165) printed pages including six (6) exhibits, two years and ten months after the Counterclaim was filed, raising for the first time, on September 8, 1959, as their Sixth Defense to Mrs. Smith's Counterclaim (filed on November 12,

1956), that the proceedings in a rescission suit, and the judgment therein, are res judicata against her of, a bar to, and estop her from asserting in this their third settlement suit which they filed the within suit, to Mrs. Smith's claims set out in her counterclaim, R. II 1381a-1546a. The Trust Companies then filed an Amended Motion for Summary Judgment to dismiss Mrs. Smith's counterclaim on September 8, 1959.

The District Court erred and the Court of Appeals upheld the ruling that Mrs. Smith is barred from asserting the claims set forth in her original counterclaim, filed in the within action on November 12, 1956, and that the claims asserted are barred by application of the rule as to res judicata. (R. I—121a-139a, R. II—1614a-1616a).

The District Court further erred and the Court of Appeals upheld the ruling in upholding the Joint Administrators' theory that all the claims of fraud now asserted by Mrs. Smith were disposed of in the original litigation between Mrs. Smith, the O'Briens and the Joint Administrators, in the case of *Patricia R. O'Brien* v. *Edwin J. O'Brien et al*, 294 Ky. 793; 172 S.W. 2d 595, (1943) and cited a long list of cases, which have no application to the within case, and the District Court did not cite but one Kentucky case to uphold his ruling and neither that case nor any of the other cases cited by him in his opinion are applicable to the within action.

Mrs. Smith's cause of action for the alleged fraud against the Joint Administrators did not arise until the Joint Administrators filed their purported final settlement of their accounts of the Estate of John A. O'Brien in the Jefferson County Court on June 21, 1950, January 7, 1952, and August 7, 1952, and not until after the Judgment of March 5, 1952, and the Amended Judgment of May 1, 1952, was filed in the Jefferson County Court approving the

Joint Administrators so-called final settlement, of the accounts of the Estate of John A. O'Brien. (R. I—233a-330a).

When Mrs. Smith filed the Rescission Suit on March 10, 1937, against James G. O'Brien and the other partners of the Edward J. O'Brien & Company for rescission of the sale of the contract of her partnership interest in the O'Brien Company and its four subsidiaries, the Joint Administrators were made defendant's with the partners of the Edward J. O'Brien & Company and the O'Brien Company and, they were sued in their individual capacities (See R. II—1392a) which is as follows:

"Jefferson Circuit Court
No. 250536. Chancery Branch, Division

Patricia R. O'Brien,.....Plaintiff.
vs. Petition in Equity
Edwin J. O'Brien, sometimes referred to as Edwin J. O'Brien, Jr.,
James G. O'Brien,
Joseph B. O'Brien,
Elizabeth Graves O'Brien,
Marie O'Brien Michael,
Fidelity & Columbia Trust Company, and Louisville Trust Company, the last named sued as Administrators of the Will annexed of John A. O'Brien, deceased, as well as in their individual capacities; and Edward J. O'Brien & Company, a copartnership, composed of the above named individuals, ...Defendants."

On March 22, 1938, the Judge of the Jefferson Circuit Court ruled that the "Petition in Equity in the Rescission Suit", must be reformed and amended. On April 11, 1938, Mrs. O'Brien-Smith complied with the order and filed the "Reformed and Amended Petition in Equity" in the Rescission Suit which is as follows: (R. II—1411a).

"Jefferson Circuit Court
No. 250536 Chancery Branch, First Division

Patricia R. O'Brien, ...Plaintiff.
vs. Reformed And Amended Petition In Equity
Edwin J. O'Brien, Jr.,
James G. O'Brien,
Joseph B. O'Brien,
Marie O'Brien Michael,
Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors under the will of Elizabeth Graves O'Brien, deceased,
The Fidelity & Columbia Trust Company and
The Louisville Trust Company, Administrators of the will annexed of John A. O'Brien, deceased, and,
Edward J. O'Brien & Company, a co-partnership, composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors under the will of Elizabeth Graves O'Brien, deceased, ... Defendants."

and, as shown in the Reformed Petition, the Joint Administrators were not sued in their individual capacities, the Joint Administrators were only named as nominal parties defendant so that Mrs. Smith could maintain the action in her name, since the Joint Administrators had refused to file the Suit for Rescission of the sale of the contract for the partnership interest and its four subsidiaries. No relief was sought against the Joint Administrators in the Petition, nor in the Prayer of the Petition, no proof was introduced against them, nor were they a party thereto, and they were not exonerated of the duties imposed upon them as Administrators of the Estate of John A. O'Brien, in the Rescission Suit.

The District Court erred and the Court of Appeals upheld him in his ruling that Mrs. Smith claimed fraud on

the part of all parties concerned in the Rescission Suit, meaning the Joint Administrators as well as the partners in the O'Brien Company, in the Rescission Suit. The Court of Appeals of Kentucky held in the Rescission Suit that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the book value, or the market value of her interest in the O'Brien partnership and the four subsidiaries, but it was the duty of her counselors and advisors to tell her the market value of her partnership interest. Those counselors and advisors were J. G. McPherson, George D. Caldwell and William Marshall Bullitt, the Joint Administrators' attorney who owned over fifty-one (51%) per cent of the Citizens Fidelity Bank & Trust Company. No relief was sought or prayed for in the Prayer of the Petition in the Rescission Suit against the Joint Administrators. Mrs. Smith did not know at that time that the Joint Administrators were guilty of fraud, misrepresentation, mismanagement, negligence, failure to disclose, concealment, misappropriation of her cash and funds in their possession, and that they transferred thousands of dollars worth of stocks that was in the name of the Edward J. O'Brien Tobacco Company, of which she owned twenty three and seventy seven one hundredths (23.77%) per cent, to a former partner until after the Joint Administrators filed their final settlement of accounts of the Estate of John A. O'Brien on June 21, 1950, January 7, 1952, and August 7, 1952, in the Jefferson County Court.

The District Court erred and the Court of Appeals upheld his ruling in his statement in paragraph three (3) on page 2 of his opinion, that the "plaintiff's (joint administrators) Original Motion for a Summary Judgment," filed in the within case on February 19, 1957, to dismiss Mrs. Smith's original counterclaim, which was filed in the within case on November 12, 1956, with her "original answer," was based upon the theory that the defendant, Mrs. Smith,

is barred by the rule of res judicata from raising the issues presented by her original counterclaim.

The District Court (Judge W. Wallace Kent) *is the one who suggested to the Joint Administrators and their attorneys at a pre-trial conference in Louisville on August 28, 1959, that they should raise the issue of the rule of res judicata,* and gave the attorneys for the Joint Administrators the law citation of *Davis* v. *McKinnon and Mooney,* and told them that he would mail them the advanced sheets before the opinion was printed, in order to help them to try to prove it.

At the pre-trial conference, counsel for Mrs. Smith stated to the District Court that no relief was sought against the Joint Administrators, and no relief was prayed for in the Reformed and Amended Petition, filed on April 11, 1938 in the Rescission Suit, in the case of *O'Brien* v. *O'Brien,* 294 Ky. 793; 172 S.W. 2d 595. Counsel for Mrs. Smith further stated to the District Court that the Joint Administrators were only named as nominal parties defendant in the "Rescission Suit," so that Mrs. O'Brien-Smith could maintain the "Rescission Suit" in her name after the Joint Administrators refused to file the suit for rescission of the sale of the partnership interest belonging to the Estate of John A. O'Brien, deceased, in the Edward J. O'Brien Tobacco Company, which Mrs. Smith inherited.

Judge E. B. Freed, Judge of the United States District Court at Cleveland, Ohio, after reading the entire Printed Record and pleadings in the Joint Administrators first settlement suit, and the Rescission Suit, upheld Mrs. O'Brien-Smith in her contentions, and ruled that the case of O'Brien v. *O'Brien, supra, did not make the issue of fraud against the Joint Administrators res judicata,* and *overruled the Joint Administrators Motion for a Summary Judgment and we quote the ruling of Judge Freed and copy herein his order on his opinion in the case of—*

"In the United States District Court for the Western District of Kentucky at Louisville, No. 870, *Patricia R. Smith* v. *The Louisville Trust Company and The Citizens Fidelity Bank and Trust Company*, filed on March 16, 1945, which was dismissed without prejudice by Mrs. Smith on March 10, 1949."

"In The District Court of The United States For The Western District of Kentucky Louisville Division

"PATRICIA R. SMITH)
v.)
THE LOUISVILLE TRUST)
COMPANY, a corporation, et al)

CIVIL ACTION NO. 870

ORDER

This matter came on for hearing on the motion of the defendants, The Louisville Trust Company and Citizens Fidelity Bank and Trust Company, for a summary judgment under favor of Rule 56 of the Rules of Civil Procedure, the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED *that the motion for summary judgment be and is hereby overruled.*

s/ E. B. FREED
United States District Judge"

November 7, 1947

"In The District Court Of The United States For The Western District Of Kentucky Louisville Division

CIVIL ACTION NO. 870

PATRICIA R. SMITH)
vs.)
THE LOUISVILLE TRUST)
COMPANY, a corporation, et al.,)

FREED, J:

MEMORANDUM RE MOTION FOR SUMMARY JUDGMENT

Defendant's (the two Trust Companies) motion for summary judgment is predicated on the contention

that two prior actions in the State Courts of Kentucky prohibit a right of recovery by the Plaintiff (Mrs. O'Brien-Smith) in this Court. The prior actions were referred to in the Defendants' (the two Trust Companies) answer, in the respective briefs of the parties and arguments of counsel as the "Rescission suit" and "Settlement suit."

The record in the Settlement suit clearly discloses that the Court refused to adjudicate the precise claim of Plaintiff (Mrs. O'Brien-Smith) urged in this action. It refused to receive any evidence in support of the charge of negligence by the Defendant corporations in handling the estate of John O'Brien. Such ruling by that Court in the Settlement suit cannot conceivably result in a bar to the instant controversy.

Whether the judgment in the case of *O'Brien* v. *O'Brien,* (294 Ky. 793), (172 S.W. 2d 595) the Rescission suit is res judicata as to this action or constitutes an estoppel by judgment must be determined by the Law of Kentucky. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.* (309 U.S. 4); *In re Potts,* 6 Cir., (142 F. (2d) 883); *Waybright* v. *Columbian Mutual Life Insurance Co.,* 6 Cir., (122 F. (2d) 245).

To render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties for whom or against whom the claim is made. *Swift Coal and Timer Co.* v. *Cornett,* (249 Ky. 760); *Ralph Wolff & Sons* v. *New Zealand Insurance Co.* (248 Ky. 304)."

"In the case of *Prewitt* v. *Wilborn,* (184 Ky. 639), the Court of Appeals clearly pointed out the distinction between the doctrine of res judicata and estoppel by judgment as follows:

"A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties, upon the same cause of action, and a second suit between the same parties upon a different cause of action. In the first instance, the judgment is a com-

plete bar to the second action, not only as to everything which 'was used in the first action to sustain or defeat the demand, but, everything, which the parties could have used properly for that purpose; but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estoppel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision and is not conclusive as to matters not decided, and the decision of which was not essential to the decision in the first suit, although issues may have been made in reference to them.' "

It is readily discernible from the examination of the Rescission Suit and this action, that there is lacking the identity of the quality of the parties necessary to bring the Rescission suit within the ambit of the doctrine of res judicata or estoppel by judgment. The principles of law laid down by the Kentucky courts applied to the causes of action in issue leads the Court to the conclusion that the motion for summary judgment must be overruled.

s/ E. B. FREED
United States District Judge"

November 6, 1947

The law that was in effect and controlling on the issues of res judicata on November 7, 1947, and in effect when the Joint Administrators committed fraud in the sale of the interest of the estate of John A. O'Brien, deceased, which was owned by Patricia O'Brien-Smith in Edward J. O'Brien Tobacco Company and its four subsidiaries for less than one-third (1/3) of the net sound market value, is the law that is controlling in the within case, and the citation given to the Joint Administrators by the District Court (Judge Kent) of *Davis* v. *McKinnon and Mooney*, 266 Fed. 2d 870, 873 (1959), does not apply to the instant case, and none of

the other cases cited on pages 7 and 8 of the District Courts opinion have any application to the within case. (R. II—1614a-1617a.)

As will be noted from the opinion of Judge Freed of November 6, 1947, on the Joint Administrators motion for summary judgment, on the same issue that Judge Kent ruled on and the Court of Appeals upheld his ruling that Judge E. B. Freed of Cleveland, Ohio, ruled that "whether the judgment in the case of *O'Brien* v. *O'Brien,* (294 Ky. 793), the Rescission Suit is res judicata as to this action or constitutes an estoppel by judgment must be determined by the law of Kentucky". See the cases of *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.* (309 U.S. 4); *In re Potts,* 6 Cir., (142 F. (2d) 883); *Waybright* v. *Columbian Mutual Life Insurance Co.,* 6 Cir., (122 F. (2d) 245). Therefore, the case of *Davis* v. *McKinnon & Moone* 266 Fed. (2d) 870, 873 (1959), which was cited in the District Court's opinion in the within action that was tried in the Common Pleas Court of Lake County, Ohio, *has no application to a case in Kentucky, in an action against Joint Administrators because they violated their trust and their bonds and their fiduciary duties in the settlement of the estate of John A. O'Brien, deceased.*

Further, Judge Freed held that "to render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties for which or against whom the claim is made, '*Swift Coal and Timber Co.* v. *Cornett,* (249 Ky. 760); *Ralph Wolff & Sons* v. *New Zealand Insurance Co.* (248 *Ky.* 304)' ".

Upon examination of the other cases cited on pages 7 and 8 of the District Court's opinion you will see that not a single one of the cases apply to the instant case. The Dis-

trict Court and the Court of Appeals should have applied the laws of Kentucky on the issue of res judicata as stated in the opinion of Judge E. B. Freed.

The adoption of the rule in the *Davis* v. *McKinnon & Mooney* case by the District Court, which was upheld by the Court of Appeals, is not the rule in Kentucky and never has been. If it is the rule now in Ohio, it did not become so until May 28, 1959, and that is years later than when this cause of action arose in the state of Kentucky.

The adoption of this rule of law now (1961 and 1964) in Kentucky which grew out of a decision in Ohio in 1959 (*Davis* v. *McKinnon and Mooney)* certainly should not be used to govern the findings in a law suit where the cause of action arose ten years or more before the decision in the *Davis* v. *McKinnon & Mooney* case, and after the litigation was instituted regardless of the unfairness of the application in the instant case it is not the rule in Kentucky and the Kentucky law should control in this decision.

Governor Wilbur M. Brucker of Detroit, Michigan, former governor of Michigan, and former Secretary of the Army, represented Mrs. O'Brien-Smith from 1940 to 1944 in the "Rescission Suit" against the O'Brien brothers, and he stated to the Joint Administrators more than once that no relief was sought against them in the "Reformed and Amended Petition filed in the Rescission Suit," nor prayed for in the prayer of the Petition in the Rescission Suit, no proof was introduced against them in the Rescission Suit, and that they were only named as nominal parties, defendant, so that Mrs. O'Brien-Smith could maintain "The Rescission Suit," in her own name, after the Joint Administrators refused to file suit for Rescission of the Contract for the sale of Mrs. Smith's partnership interest in the O'Brien Company.

It was not necessary for the Joint Administrators to employ attorneys in the "Rescission Suit" and to file strong briefs against the estate of John A. O'Brien and Mrs. O'Brien-Smith, and when the first opinion was rendered in the Rescission Suit by the Court of Appeals of Kentucky, it was a divided court. One judge was home ill, but three of the judges were of the opinion that Mrs. O'Brien-Smith was entitled to eighty-five thousand ($85,000.00) dollars or more because that was the net profit belonging to the estate of John A. O'Brien, deceased, for the year of 1935 from Edward J. O'Brien & Company and its four subsidiaries, which was not disclosed to the defendant Mrs. O'Brien-Smith before her partnership interest was sold. The Joint Administrators and their attorneys should have joined with Governor Brucker in filing briefs on the petition for rehearing in the Rescission Suit and in the Oral Argument of Governor Brucker before the Court of Appeals of Kentucky on the Petition for rehearing; instead, the Joint Administrators and their attorneys joined with the O'Brien brothers and bitterly fought against the estate and bitterly opposed Mrs. O'Brien-Smith throughout the "Rescission Suit." Now why should this estate pay either the Joint Administrators or their attorneys in the "Rescission Suit." The above was all set out in the "Defendant's, Mrs. Smith, Response to Joint Administrators Printed Reply to Mrs. O'Brien-Smith's original counterclaim."

The District Court erred and the Court of Appeals upheld his ruling, and we ask this Court to consider this question; "Should lawyers be paid for law suits filed and prosecuted in an estate, when they lost each and every suit in the Court of Appeals of Kentucky and even after the Court of Appeals of Kentucky ruled against them, the Joint Administrators defied the Rulings of the Court of Appeals of Kentucky; they defied the ruling of the Judges of the Jefferson

County Court and kept on filing suits and appeals in the Jefferson Circuit Court, and the Court of Appeals of Kentucky, lawyers who hold themselves out as being well versed on Kentucky law and administrators who claim they have the largest banks and trust companies in Kentucky. Thus, the estate of John A. O'Brien and Mrs. Smith should be reimbursed for the expenses of those law suits and for the long years of tiresome and expensive litigation, which Mrs. Smith has had to pay for out of her own pocket all because the trust companies and their attorneys knew they had committed fraud in the sale of the interest owned by Mrs. O'Brien-Smith in the Edward J. O'Brien Tobacco Company, and its four subsidiaries and other acts of fraud and they were hoping to wear down the resistance of Mrs. O'Brien-Smith and her lawyers and to force her to give up her legal rights and claims in the estate of John A. O'Brien, deceased.

(2) The District Court Erred In His Findings Of Fact Which Are Not Based On Substantial Evidence And Are Not Binding Because They Are Clearly Erroneous, And In Refusing To Grant A Trial Of This Action and the Court of Appeals Accepted His Findings Of Fact—Page 2 Of The Opinion.

The District Court (Judge W. Wallace Kent, sitting by designation) denied Mrs. Smith the right of a trial in this action. The facts in this action are disputed and the issues presented are not solely those of law.

The principle issue before the Court as was stated at the outset of our Petition, is the sale of Mrs. Smith's interest in the partnership of Edward J. O'Brien & Company and its four subsidiaries by the Joint Administrators of the estate of John A. O'Brien, for less than one third of its market value, and in violation of the terms of the partnership agreement.

Mrs. Smith was denied the right to submit any evidence as to the surrounding facts and circumstances existing both preceding, leading up to, and at the time of the execution of said contract. These are all factual issues.

On April 2, 1957, the Judge of the District Court before whom this case was being heard, entered an order that he would proceed no further in this case. (See Appendix B hereto, Printed Transcript of Record, Volume I, pages 393a-394a).

It was contended by Martin R. Glenn, Clerk of the U. S. District Court for the Western District of Kentucky at Louisville, that he wrote a letter on April 2, 1957, to Honorable Charles C. Simons, Chief Judge of the U. S. Court of Appeals for the Sixth Circuit, requesting him to assign a Federal Judge to hear this action. (R. I—396a).

No Judge was appointed to hear this action until two years and three months later, until on July 31, 1959, there was entered in the within action, an order designating the Honorable W. Wallace Kent, U. S. District Judge, Western District of Michigan, for service in another District within his Circuit to hear this action. (R. I—431a).

On July 25, 1959, before the Order of designation of July 31, 1959, was filed in the Clerk's office, there was an order entered in the within action setting this case for a Hearing on all pending motions at Louisville, Kentucky on August 27, 1959, and for a Pre-trial conference, on August 28, 1959. (R. I—430a-431a).

Bear in mind no steps had been taken, no pleadings of any kind had been filed in this action for over two years. It was not Mrs. Smith or her counsel who had caused the delay.

When the order of designation was filed on July 31, 1959, six days before that on July 25, 1959, the case was set for

a hearing on August 27, 1959. Counsel for Mrs. Smith was at Camp Breckinridge, Kentucky, where he had been for approximately ten (10) days as Commanding Officer of the 2148th U. S. Army Garrison Unit composed of some eighty five officers and two hundred sixty seven enlisted men. This Army Garrison Unit was undergoing its annual active duty training, and counsel for Mrs. Smith could not return to Louisville until early August, 1959. The supervising and staff work in the training of this Garrison Unit required the personal presence of its Commanding Officer since the unit was trying to achieve a superior rating, which it did.

On August 5, 1959, counsel for Mrs. Smith, filed a motion for thirty days extension of time in which to prepare for a hearing on all pending motions and for the pre-trial conference and the filing of a brief, in the within action, and filed an affidavit in support thereof, and took the said motion and affidavit to Judge Kent in Grand Rapids, Michigan. The motion was very summarily overruled and an order was entered overruling the said motion on August 8, 1959. (R. I—432a-451a).

The District Court erred in arbitrarily denying counsel for Mrs. Smith, time to adequately prepare for the hearing on motions heard on August 27, 1959, and the pre-trial conference on August 28, 1959. Judge Kent did not rule on the two motions for one year and seven months, until on March 4, 1961, when he rendered a seventeen page opinion R. II—1607a-1629a), and on April 20, 1961, an order was entered thereon (R. II—1636a).

The District Court (Judge W. Wallace Kent) only came to Louisville twice, and only heard arguments on motions twice, namely on August 27, 1959, and November 9, 1962. The Transcript of the Hearing on Motions on August 27, 1959, will be found on pages 1314a-1380a, Volume II,

Printed Transcript of Record. The Transcript of the Hearing on Motions on November 9, 1962, will be found on pages 2135a-2174a, Volume II, Printed Transcript of Record.

On August 28, 1959, (on Judge Kent's first trip to Louisville) there was a pre-trial conference had. On August 27, 1959, the day before the pre-trial conference in the open court room, Judge Kent stated that Mrs. O'Brien-Smith could not attend the pre-trial conference unless she was ready to compromise the case with the Joint Administrators. Mrs. Smith made no attempt after that statement was made to attend the pre-trial conference. On August 28, 1959, when the pre-trial conference was had (not in the open court room but in the private chambers of Judge Roy Shelbourne in the District Court), Judge Kent refused to permit the secretary for counsel for Mrs. Smith, to take any notes at the hearing and ordered him to leave the conference, which he did.

On October 6, 1962, the District Court wrote a letter to the Clerk of the District Court to notify counsel for the Plaintiff and counsel for the Defendant, that the within action was set for trial, on December 3, 1962; such notice was received by counsel. (R. II—2046a-2047a.)

On November 9, 1962, motions were heard before the District Court on "Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer and Her Second Amended Counterclaim, and Exhibits Numbers 42 through 75 (except Exhibit No. 51, which was inadvertently omitted), which had been filed on May 15, 1961". (R. II—1706a-1989a) and the "Plaintiffs" (Joint Administrators) Motion For Summary Judgments In Their Favor On All Pending Claims And Counterclaims, And Their Notice Thereof And Of Hearing Thereon, which had been filed on October 26, 1962". (R. II—2053a-2064a.) The District Court overruled Mrs. Smith's Motion, entered an order and granted

the Joint Administrators' Motions for Summary Judgments and gave no reason for not having a trial of this action, (R. II—2090a-2093a), and granted to the Joint Administrators and their attorneys Two Hundred Eighteen Thousand Four Hundred Seventy Two Dollars and Eighty Cents ($218,472.80) for fees and interest for the settlement of the estate of John A. O'Brien upon which they reported in the inventory to have a market value of Five Hundred Nine Thousand Dollars ($509,000.00). (R. II—1982a-1989a.)

The Joint Administrators complaint filed in the within action consisting of twenty-eight (28) printed pages and filed therewith was their Exhibit No. I, a printed copy of "Their Account and Final Settlement of the Execution of Their Trust", of the estate of John A. O'Brien, deceased, which they had filed in the Jefferson County Court on June 21, 1950, consisting of thirty-seven (37) printed pages with six (6) exhibits copied therein pertaining to the sale of Mrs. O'Brien-Smith's partnership interest in the Edward J. O'Brien & Company and its four subsidiaries. Witness the great length to which the Joint Administrators have gone in stating and stressing the facts of the case, in regards to the negotiations and sale of Mrs. O'Brien-Smith's partnership interest, constituting a recognition by them that the principle issues are factual. (R. I—13a-99a.)

The Transcript of Record of this case consists of two thousand six hundred twenty-five (2,625) printed pages, but no testimony was given in this action in the District Court. There was only one deposition filed in the within action and that was the deposition of Edward C. Wirotzious, which was not taken in this action, it was taken in the Rescission Suit (which was only against the brothers of John A. O'Brien), but had never been filed in any action before, which was filed on behalf of Mrs. Smith, in the

within action consisting of fifty-two (52) typewritten pages, each page signed by him and when printed it consisted of forty-eight (48) pages, which completely refutes all statements contained in the Joint Administrators' complaint and their Exhibit No. I thereto, pertaining to the market value, the negotiations, and the sale of Mrs. Smith's partnership interest, by the Joint Administrators. (R. I—1230a-1277a.)

The District Court (Judge W. Wallace Kent) handed down an opinion on March 4, 1961, consisting of seventeen (17) typewritten pages, and almost half of each page consisted of his listings of the four lawsuits and three appeals filed and prosecuted in the O'Brien estate in the Courts of Kentucky by the Joint Administrators, from February 18, 1937, to November 20, 1953, (which were all won by Patricia O'Brien-Smith in the Court of Appeals of Kentucky and are printed decisions as set-out in our statement of facts), and the Judgment and Amended Judgment of the Jefferson County Court of March 5, and May 1, 1952. (R. II—1607a-1629a.)

The District Court adopted almost verbatim, the proposed Findings as submitted by the Joint Administrators, and a so-called Judgment of March 5, 1952, and the Amended Judgment of May 1, 1952, of the Jefferson County Court. The findings as announced by the District Court are not correct. His findings are not supported by law or the record evidence, yet the Court of Appeals accepted the District Court's findings without reviewing them.

The District Court accepted the proposed Findings of Fact and Conclusions of Law of the Joint Administrators with respect to one of the most important phases of the within action. We proposed that the Joint Administrators should be required to account to Mrs. Smith for the full

market value of her partnership interest in Edward J. O'Brien & Company and its four subsidiaries, which they sold in 1935.

The District Court erred in his finding of fact throughout his opinion and an example is on the first and second page of his opinion, his finding in regards to Mrs. O'Brien-Smith and the members of the family of John A. O'Brien. His statements are erroneous because there is no proof in the record that there was ever a dispute between Mrs. O'Brien-Smith and the members of the family of John A. O'Brien, as to the validity of the testamentary instruments found after the death of John A. O'Brien; there was no dispute as to the value of his interest in the Edward J. O'Brien & Company; the effectiveness of an insurance trust; or any other matters.

Mrs. Smith's Statement of Facts herein are amply supported by numerous direct references to the printed Transcript of Record.

On April 3, 1961, counsel for Mrs. Smith filed, "Defendant's (Mrs. Smith) Petition For Rehearing" on the District Court's Opinion consisting of thirty-six pages (R. II – 1646a-1691a).

On April 21, 1961, an order was entered by the District Court which overruled the "Defendant Mrs. Smith's Petition For Rehearing" (R. II—1697a-1698a).

(3) The District Court Erred In Refusing To Have A Trial Of This Action And The Issues Involved In The Sale By The Joint Administrators Of Patricia R. O'Brien-Smith's Twenty Three And Seventy Seven One Hundreds Per Cent Partnership Interest In The Edward J. O'Brien Tobacco Company And Its Four Subsidiaries, For Less Than One Third Of Its Market Value And In Violation Of The Terms Of The Partnership

Agreement And The Court Of Appeals Upheld His Rulings.

We come now to the consideration of the all-important negotiations for the sale of Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company and its four subsidiaries by the Joint Administrators of the estate of John A. O'Brien on November 5-15, 1935, purportedly to James G. O'Brien one of the partners in the Company.

The Record of this case disclosed that the offer made to Mrs. O'Brien-Smith, for the purchase of her partnership interest was written and composed by J. G. McPherson and George D. Caldwell, the two Vice-Presidents of the two Trust Companies, the Joint Administrators of the estate of John A. O'Brien, the plaintiffs in the within action, and by the two attorneys representing the Joint Administrators of the O'Brien estate namely William Marshall Bullitt, who represented the Citizens Fidelity Bank & Trust Company, and Squire Ogden of the law firm of Gordon, Laurent and Ogden, who was paid two thousand ($2,000.00) dollars from the O'Brien estate, to represent the Louisville Trust Company one of the Joint Administrators, and the three brothers of John A. O'Brien.

There is no proof in the record of this action that Edward C. Wirotzious, or any accountant for Mrs. Smith, or that Judge L. R. Curtis, a friend of Mrs. O'Brien-Smith, who attended two conferences, ever even saw the offer or contract for the purchase of the partnership interest or the bill of sale or deeds for Mrs. Smith's partnership interest. The only counselors and advisors that Mrs. O'Brien-Smith had and the only ones paid from the O'Brien estate for advice before her partnership interest was sold were, J. G. McPherson, George D. Caldwell and William Marshall Bullitt of the law firm of Bruce & Bullitt, now the law firm of Bullitt, Dawson & Tarrant.

The Court of Appeals of Kentucky held in the Rescission Suit of Patricia R. O'Brien v. Edwin J. O'Brien et al, 294 Ky. 793, 172 S.W. 2d 595, *that Mrs. O'Brien-Smith was the sole beneficiary of the will and the estate of her late husband John A. O'Brien.*

The Court of Appeals of Kentucky held in the Rescission Suit, that there was no endorsement of any insurance trust agreement on the policies which would make payable to the brothers of John A. O'Brien any of the two hundred one thousand ($201,000.00) dollars of life insurance which was payable to Ivy Patricia O'Brien (now Smith).

The Court of Appeals opinion in the Rescission Suit stripped the Joint Administrators of all their claimed compromising points which induced Mrs. Smith to sell her partnership interest, such claims were not legitimate and were wholly without merit or legal foundation, they were only bogus claims, in order to bring about the sale of Mrs. Smith's partnership interest, by the Joint Administrators.

The statement of facts set for in this Petition stand uncontradicted and undisputed by the Joint Administrators of the O'Brien estate or anyone else.

The record in the within action clearly proves that the Joint Administrators misrepresented the market value and the book value of the partnership interest and the law and facts to Mrs. O'Brien-Smith in order to induce her to agree to the sale of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries by the Joint Administrators, for less than one third (1/3) of its market value, and in violation of the terms of the partnership agreement between the partners of the O'Brien Company, which is clearly proven by the eighty-two (82) exhibits of Mrs. O'Brien-Smith filed and tendered for filing in the Record in the within action and the deposition of

Edward C. Wirotzious, filed in the within action on behalf of Mrs. O'Brien-Smith by order of the District Court on August 28, 1959, which are referred to in the statement of facts.

The Joint Administrators violated their statutory duties imposed upon them by law in Kentucky in every respect, in their representing Mrs. O'Brien-Smith, and the Estate of John A. O'Brien, as we have clearly shown and proven.

The Joint Administrators, upon qualification, took title to the property of the estate of John A. O'Brien, including all his interest in the partnership firm of Edward J. O'Brien & Co. and its four subsidiaries. *A provision of the partnership articles, of a substantial advantage to the estate, allowed five years' participation by a deceased partner's estate in the profits of the business following a partner's death.* Yet, the Joint Administrators, entirely disregarding this advantage, immediately began to manipulate and maneuver by their actions, strategy, and misrepresentations to dispose of the estate's interest in the Edward J. O'Brien & Co. and its four subsidiaries for less than one third of its value. *The Joint Administrators created "bogus" claims, intimidated, threatened and made numerous misrepresentations to coerce and force the Defendant Patricia O'Brien-Smith to acquiesce in their scheme to dispose of the partnership interest on terms highly beneficial to the surviving partners, whose favor they curried because of their various extensive business relations and dealings, calculated ultimately for their own private profit;* all to the great detriment and loss to the estate, and Mrs. Smith to which they owed sole loyalty and duty. In addition to actual threats made in regard to such matters as a non-existent insurance trust agreement, knowing full well no such agreement existed, the Joint Administrators insisted the land and buildings of the partnership business

was real estate in the sense that Mrs. O'Brien-Smith would get only 1/3 for life, rather than the entire interest owned in the O'Brien Company and its four subsidiaries by John A. O'Brien, which he left Defendant Patricia O'Brien-Smith under the terms of his will, as ruled and held by the Court of Appeals of Kentucky in Mrs. Smith's favor.

Despite the expert knowledge and skill the Joint Administrators profess to possess in business, financial matters, and the administration of estates, they made no effort to determine the actual market value of the interest owned in the Edward J. O'Brien & Co. by the estate of John A. O'Brien which they represented, for the sole heir Patricia O'Brien-Smith. The mere fact they sold and conveyed that interest, worth more than one million dollars, for only $380,000.00 speaks for itself! But more than that, *the undenied and undisputed facts disclose that they made no attempt to obtain or make an independent audit, inventory or appraisal, to accurately determine the market value of those assets.* In fact, they did not even insist or require the surviving partners to submit a current audit or balance sheet. These acts alone are sufficient to clearly demonstrate their lack of, at least the ordinary skill, prudence and diligence owed the estate and Mrs. O'Brien-Smith in their fiduciary capacity, and, consequently their negligent handling of the estate. But the facts—and the issues in this case—go far beyond simple negligence. Witness the deliberate falsification made to Mrs. O'Brien-Smith that the partnership business operated at a loss during the year of 1935 prior to the sale, and the Joint Administrators admit that the partnership interest was sold on the basis of the values shown on Mrs. Smith's Exhibit No. 53, page 32-39 of this Petition, which resulted in a loss to Mrs. Smith of over Eight Hundred Thirty Six Thousand Five Hundred Thirty Six Dollars and Fifty Seven Cents ($836,536.57) on the

basis of Twenty Three and Seventy Seven Hundredths per cent (23.77%), the admitted percentage owned by Mrs. Smith, as shown on pages 56 and 57 of the within Petition, also see R. II—1920a and on the basis of her rightful ownership of Twenty Eight and Thirty Three Hundredths per cent (28.33%) the loss to Mrs. Smith was One Million One Hundred Sixty Thousand Four Hundred and Thirty Nine Dollars and Fifty Five Cents ($1,160,439.55), as shown on pages 69-70 of this Petition. The overall misrepresentation and disloyalty of the Joint Administrators, along with their failure to secure to the estate all that was rightfully due, established a definite and real loss to the estate and a recognized cause of action for the sole heir, the Defendant Patricia O'Brien-Smith, which the District Court by its rulings has denied to her, and the Court of Appeals upheld the ruling.

The District Court refused to have a trial of the issues in the within action, and the Court of Appeals upheld this ruling thereby preventing the introduction of the proof that would prove that the Joint Administrators and their attorneys connived and conspired with the brothers of John A. O'Brien, to conceal the true market value of Mrs. O'Brien-Smith's Partnership interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries. *That the Joint Administrators were not entitled to any fees at all and that their attorneys were not entitled to any additional fees, for representing the Joint Administrators and that they were guilty of fraud, misrepresentation, mismanagement, negligence, coercion, undue influence, and threats of claims which were not legitimate or meritorious.*

The Joint Administrators, in order to further coerce and force Mrs. O'Brien-Smith to sell her Partnership interest in Edward J. O'Brien Tobacco Company and its four subsidiaries *before the end of the five (5) years as provided*

for in the Partnership Agreement, would not require the Edward J. O'Brien Tobacco Company, to pay to Mrs. O'Brien-Smith any profits due her each year from her interest in the O'Brien Company and its four subsidiaries, and she was required to borrow money from the Fidelity and Columbia Trust Company, now Citizens Fidelity Bank & Trust Company, at the rate of 5% per annum to live on until they sold her Partnership interest purportedly to James G. O'Brien sometime in 1935. The amount which Mrs. O'Brien-Smith borrowed to live on was fifteen thousand ($15,000.00) dollars. See copy of cancelled notes which were paid after the Partnership interest was sold by the Joint Administrators, Defendant-Appellant Mrs. O'Brien-Smith's Exhibits No. 27, 27a, 27b and 27c, pages 669a to 677a, Volume I, Printed Transcript of Record, filed as Appendix B hereto.

The Court of Appeals stated on page four of its opinion, that "In view of our holding on the question of res judicata, we do not find it necessary to discuss in this (its) opinion, the question of the Statute of Limitations." Realizing full well that the District Court had erred in his ruling on that issue.

See Petition for Rehearing on District Court's opinion, R. I—pp. 1667a-1676a Appendix B hereto.

4. The District Court Erred And The Court Of Appeals Upheld This Ruling In Denying Mrs. Smith A Trial On The Issues Of Her Counterclaim As A Defense Against Claims Asserted By Joint Administrators For Their Fees And Fees For Their Attorneys.

Another aspect of the law in relation to the plea of limitations should have been considered by the District Court on the Joint Administrators motion for Summary Judgment. Mrs. Smith's counterclaim for loss on the sale of

decedent's partnership interest cannot be barred by limitations as a defense against the claims asserted by the Joint Administrators and their attorneys. The counterclaim relating to the sale of the partnership interest arises out of the same occurrence or transaction sued on by plaintiffs Joint Administrators, namely the administration by the Joint Administrators of the estate of the decedent. In such cases, the counterclaim is also a defense, and as long as this court will hear the Joint Administrators case, time will not bar the answer of the defendant, Mrs. Smith.

The principle that the statute of limitations has no application to a counterclaim arising out of the same occurrence or transaction sued on is further announced in the case of *Lewis* v. *Kash,* 239 Ky. 38 S.W. (2d) 978, where the court said and held:

> "As pointed out in the case of *Lusher et al* v. *Security Trust Co. et al,* 178 Ky. 593, 199 S.W. 613, L.R.A. 1918C, 615, the cases of *Altman & Taylor Co.* v. *Meade,* 121 Ky. 241, 89 S.W. 137, 28 Ky. Law Rep. 208, 123 Am. St. Rep. 193; *Weakley* v. *Meriweather,* 156 Ky. of 304, 160 S.W. 1054, and cases cited therein announced the rule that the pleas of limitations will not prevail against the right of the defendant to assert by way of counterclaim transactions connected with and growing out of the matter that was the basis of the suit."

The foregoing rule is recognized in Federal procedure, and is stated in Moore, Vol. 3, p. 25, as follows:

> "13.11 Statute of Limitations
>
> As pointed out in Sec. 13.02, supra, there is no difference for purposes of pleading between so-called 'set-off,' 'recoupment,' and 'independent claims'; all constitute counterclaims. This in no way affects the substantive problem as to whether the statute of limitations has run against the claim pleaded as a counterclaim. This recoupment, which is necessarily based

on matter arising out of the transaction sued on, when used only to defeat the plaintiff's claim, is never barred by the statute of limitations so long as the main action itself is timely."

5. The District Court Erred In Granting The Plaintiffs' Joint Administrators' Motion For Leave To File An Amended Reply To The Defendant Mrs. O'Brien-Smith's First Counterclaim And The Court of Appeals Upheld This Ruling.

The District Court erred in granting the "Plaintiffs' Joint Administrators' Motion for leave to file an amended reply to the Defendant Mrs. O'Brien-Smith's first Counterclaim." Almost three years after Plaintiffs filed their reply to the Defendant Mrs. O'Brien Smith's first counterclaim, they tendered their amended reply, raising for the first time the plea of res judicata, invoking Rule 15 of the Federal Rules of Civil Procedure and asserting as grounds for this new defense the decision of *Davis* v. *McKinnon & Mooney,* 266 F. (2d) 870, decided May 28, 1959. Their amended reply was not tendered until September 8, 1959; yet from July 22, 1959, when notified by the Court (Judge Kent) that a hearing on their first motion for summary judgment, and all other pending motions, would be held on August 27, 1959, wherein briefs were written and full arguments were had in the District Court on said date, they had ample opportunity to assert any additional defenses. In this manner, before the District Court rendered a decision, the Joint Administrators were erroneously allowed to raise the plea of res judicata, as their sixth defense, in their amended reply.

Rule 15 does not permit or allow for amended replies in this manner, which are not meritorious. The case of *Davis* v. *McKinnon & Mooney* has no application to the issues of the counterclaim filed by the Defendant Mrs. O'Brien-Smith for reasons that the principles of law laid down by the

Kentucky Courts govern on the question of res judicata, and the cited case does not alter or change the rule in Kentucky nor the applicable law in this litigation on the point. Further, as Judge E. B. Freed ruled in 1947 against these Joint Administrators on the identical issue, the Rescission Suit, as determined by applicable Kentucky law, did not and does not constitute a bar to the issues raised by Mrs. Smith's counterclaim. The case of *Davis* v. *McKinnon & Mooney* does not alter the duties and responsibilities imposed by the statutory and decision law of Kentucky upon administrators, so as to bar the Defendant Mrs. Smith from now raising the issues of fraud, misrepresentation, concealment, failure to disclose, negligence and mismanagement by the Joint Administrators of the O'Brien Estate. Thus, there were no valid grounds for allowing the filing of the amended reply and the District Court erred in so admitting it and the Court of Appeals upheld his ruling. The copy of the Joint Administrators' Amended Reply delivered to counsel for the Defendant Mrs. Smith, had been altered by removal of the original printed pages numbered "10" through "33," so that it consisted of only 152 pages, with a carbon copy of the Circuit Court Clerk's Certificate and Attestation pasted on the back sheet. It is evident the original reply as printed, totaled 174 printed pages. A piece of paper was pasted over the top portion of page 34 and the number "10" affixed thereto; thereafter all pages were renumbered in ink from "35" through "174," to read "11" to "152." Was it intended that the missing 22 pages not be seen by Mrs. Smith only? or by the Court? or by both?

6. The District Court Erred In Granting The Plaintiffs' Joint Administrators' (First) Motion For Summary Judgment As To The Defendant's Original Answer And Counterclaim.

The District Court erred in granting the plaintiffs Joint Administrators first motion for summary judgment as to

Mrs. Smith's original answer and counterclaim. This motion, as finally amended, on September 8, 1959, and the Court's ruling thereon, were based on the theory that the issues raised by the original counterclaim are barred by (1) the Statute of Limitations and (2) the rule of res judicata.

In the brief, filed in the Court of Appeals under paragraphs Roman Numerals III and V, we clearly showed that the issues raised by Mrs. Smith's original answer and counterclaim, are neither barred by the Statute of Limitations nor the application of the rule of res judicata. This is fully supported by the "Affidavit of Patricia O'Brien-Smith in Opposition to 'Plaintiff's Joint Administrators' Motion for Summary Judgment' and Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's (original answer and) Counterclaim," filed March 21, 1957. (R. I—342a-388a); also "*Supplemental Affidavit of Patricia O'Brien-Smith in Opposition to 'Plaintiffs' Joint Administrators' Motion for a Summary Judgment'*"; and "Second Response to the 'Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim filed Herein November 12, 1956,'" tendered on August 27, 1959, *with 35 exhibits attached thereto, and filed in the within action pursuant to order of the District Court on August 28, 1959.* (R. I—472a-1279a)

In addition, plaintiffs Joint Administrators' original motion for summary judgment as to the counterclaim raised only the theory of the Statute of Limitations. *Mrs. Smith objected to an amended motion (R. II—1565a) which, for the first time, raised the additional theory of res judicata.* Thus, the same reasons set forth in paragraph VI, *supra*, as error in granting plaintiffs' motion for leave to file an amended reply, belatedly allowing them to raise the res judicata question for the first time, are extended here as

error in granting the plaintiffs' amended motion for summary judgment, as to that portion concerning the question of res judicata.

7. The District Court And The Court of Appeals Rulings Violated KS 1067, Which Is Now KRS 25.200, And Rule 15 Of The Federal Rules of Civil Procedure In Denying Mrs. Smith's Motion For Leave To File Her First Amended Answer And Her First Amended Counterclaim, Surcharging The Joint Administrators Settlements Of Accounts—And On Bond Of The Estate Of John A. O'Brien, Which Is Provided For Under KS 1067, Now KRS 25.200.

The District Court and the Court of Appeals Rulings violated KRS 25.200 and Rule 15 of the Federal Rules of Civil Procedure in denying "Mrs. Smith's Motion For Leave To File Her First Amended Answer and (Her First) Amended Counterclaim, Surcharging The Joint Administrators So-called Final Settlements Of The Accounts—and On Bond of the Estate of John A. O'Brien," which "settlements" were filed by the Joint Administrators in the Jefferson County Court at Louisville, Kentucky, on June 21, 1950, January 7, 1952 and August 7, 1952. (R. I—164a-330a) Such denial was in violation of KRS 25.200.

In the opinion of the District Court rendered in the within action on March 4, 1961 (which was fully upheld by the Court of Appeals), (R. II—1607a-1628a) it held that:

A. "It is axiomatic that the District Courts of the United States in such Districts as this have no jurisdiction over probate matters."

B. "That the right of the defendant (Petitioner Mrs. Smith) to surcharge the Joint Administrators settlement of accounts depended upon whether the set-

tlement of accounts filed was a final account which it was so labeled."

(He did . rule if it was a final settlement of accounts or not) and we contend it was not.

(1) "Whether the defendant (Petitioner Mrs. Smith) took part in the proceedings in connection with the settlement of that account as required by the Kentucky Statutes." (R. II—1616a-1618a)

(2) "That she (Petitioner Mrs. Smith) took all possible steps to prevent the settlement of the account . . . It would appear that she had no objections to such accounting, as such."

(3) "It appears from the record that the defendant (Petitioner Mrs. Smith) participated to a substantial extent, in the proceeding leading to approval of the final account, by using every remedy available to prevent the consideration and determination of the final account filed by the plaintiffs-administrators" (the two Trust Companies). (R. II—1619a-1620a)

(4) "That the defendant (Petitioner Mrs. Smith) took part in and participated in the settlement of the final account within the meaning of the Kentucky Law."

C. "That her (Mrs. Smith's) remedy was by appeal to the Jefferson Circuit Court, from the Judgment of March 5, 1952, and the amended Judgment of May 1, 1952, of the Jefferson County Court, and that 'It is not for this Court (District Court) at this time to review the findings of the County Court of Jefferson County.'" . . . (R. II—1620a-1629a) (The District Court did not state when the court should review the findings.)

Yet, the District Court admitted that Mrs. Smith did not file any exceptions and stated: (R. II—1618a)

> *"That she (Mrs. Smith) did not file any actual exceptions challenging the propriety of the accounting*

for receipts and disbursements or the actions of the administrators as set forth in the final account.''

8. The District Court Erred And The Court Of Appeals Upheld His Ruling In Holding That The United States District Courts Have No Jurisdiction Over Probate Matters.

The District Court erred and the Court of Appeals upheld his Ruling when it held that it is axiomatic that the District Courts of the United States in such districts as this, have no jurisdiction over probate matters. (R. II—1616a-1617a)

The cases cited by the District Court in its opinions and upheld by the Court of Appeals are to be distinguished and in no way abrogate the established rule of a long line of Federal decisions that a Federal Court sitting in a state, whereby the law of said state equity courts of general jurisdiction have concurrent or superior jurisdiction with the County Court having probate jurisdiction, to entertain an independent suit ''inter partes'' involving a like subject matter, then the Federal Court also has jurisdiction.

We are fully upheld in this contention by the case of *First National Bank & Trust Company, Guardian for Marie Therese Corby, Plaintiff* v. *Madeline Corby Morgan Webber, etc., Defendants*, filed in the District Court of the United States for the Eastern District of Kentucky at Covington, February 7, 1934.

In a motion to remand the above styled case, counsel for the plaintiff moved to remand this case to the Kenton Circuit Court because of lack of jurisdiction in the Federal Court, wherein Judge Cochran said:

> ''We have no probate courts in Kentucky. We have County Courts which have probate jurisdiction which they have is of a very limited character. They have

power to probate wills, to appoint and remove personal representatives and guardians and to state their accounts which is called a settlement thereof. This is all the power they have. They do not have possession of the estates or jurisdiction of the res. They do not have power to make orders as to the handling by personal representatives or guardians of the estates in their hands or as to their disposition or distribution. The personal representatives and guardians handle, dispose of and distribute the estates in their hands as the law requires them to do, and after they have so done they go before the county judge and state or settle their accounts and his action may be carried by exceptions to the county court and circuit court and Court of Appeals.

By express provisions of the Civil Code of Practice of Kentucky the circuit courts of the state are given jurisdiction of suits against personal representatives and guardians for the jurisdiction of the Courts of this State."

There were other arguments involved, but on March 30, 1934, Judge A. M. J. Cochran, Judge for the Eastern District of Kentucky, gave the following opinion in overruling the motion to remand:

"*There is no conceivable reason, requisite diversity of citizenship existing and amount in controversy being sufficient, why such a suit cannot be brought originally in this court or if brought in the state circuit court why it may not be removed to this court.* If there is an action or suit which can be brought in the state circuit court, of which this court does not have jurisdiction, original or on removal, if diversity of citizenship exists and the amount in controversy is sufficient it does not occur to me. I do not find it necessary to go into the authorities on the question. The lack of any authority exactly in point is due to the fact that in many, if not most of the jurisdictions of this country, there are probate courts with the powers and jurisdiction heretofore stated. *Decisions that federal*

jurisdiction does not exist of probate matters and to the effect that in such jurisdictions the federal courts have jurisdiction to determine the rights of the parties, but no more, are indirect authorities in support of the position here taken. Those decisions are based on the ground that the probate courts have jurisdiction of the res. As we have no probate courts and as such probate jurisdiction as county courts have is of the limited character above pointed out, it necessarily follows that the federal courts in this state have full jurisdiction of the settlement of the accounts of personal representatives and the disposition and distribution of the estates in their hands. *In exercising such jurisdiction, they do not invade the exclusive jurisdiction of any state court.* The motion to remand is overruled."

In the case of *Griffith* v. *Bank of New York*, 147 Fed. (2d) 899, February 16, 1945, which is applicable to the instant case, it held:

"Though the settlement thus envisaged has been fully consummated, *plaintiff now alleges that her consent was obtained by duress and that she has been damaged by the duress practiced upon her. Acts constituting the duress are alleged to be defendant's (the Two Trust Companies here) willful withholding of principal and income of the estate, initiation of unnecessary and expensive litigation exhausting this plaintiff (Defendant-Petitioner here) and her co-beneficiary financially* (referring to the action for construction of the will which resulted in a decree sustaining the validity of the trust, *Bank of New York* v. *Kaufman*, Sup. 26 N.Y.S. 2d 474, affirmed 261 App. Div. 898, 26 N.Y.S. 2d 316; 285 N.Y. 854, 33 N.E. 2d 566), *and threatened additional unfair and oppressive expense of litigation and withholding of the estate, coupled with refusal of information as to the trustee's conduct of the trust, bringing plaintiff to 'a point of discouragement and despair' and fear of loss of her estate, so that she was not in a position to contract freely or negotiate a fair settlement with defendant.*"

"For it is well settled that the federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court judgment obtained by fraud. Marshall v. *Holmes,* 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. And though it was once thought necessary that such fraud be extrinsic, so that it could not have been considered in the original action. *United States* v. *Throckmorton,* 98 U.S. 61, 25 L. Ed. 93, the later cases no longer seem to adhere strictly to even his limitation. Marshall v. Holmes, supra; *Publicker* v. *Shallcross,* 3 Cir., 106 F. 2d 949, 125 A.L.R. 386, certiorari denied 308 U.S. 624, 60 S.Ct. 379, 84 L. Ed. 521; cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U.S. 238, 245, 246, 64 S.Ct. 997."

"(2) But putting aside the unsettled question whether cases such as those of Holmes and Publicker definitely mark the elimination of the Throckmorton restriction, cf. *Graver* v. *Faurot,* 162 U.S. 435, 16 S.Ct. 799, 40 L. Ed. 1030, *the District Court erred because the duress or fraud here involved was, as alleged, sufficient to have warranted a chancellor in disregarding or setting aside the prior judgment. Since the consent to that judgment is alleged to have been procured by the trustee's threat to tie up the property indefinitely unless settlement was made, this case is substantially identical with Ingram* v. *Lewis,* 10 Cir., 37 F. 2d 259, 70 A.L.R. 702, certiorari denied 282 U.S. 842, 51 S.Ct. 22, 75 L. Ed. 747, where a judgment of dismissal of an action for an accounting was disregarded by the federal court, since such dismissal was based on a release obtained by the trustee on threat of withholding the property. See also *Park* v. *Parl,* 5 Cir. 123 F. 2d 370; *Seay* v. *Hawkins* 8 Cir., 17 F. 2d 710; *Jefferson* v. *Gypsy Oil Co.,* 8 Cir., 27 F. 2d 304; *Horton* v. *Stegmyer,* 8 Cir., 175 F. 756, 758, 20 Ann. Cas. 1134."

"Though the court in the Ingram case, supra, did not in so many words classify the case as one of 'extrinsic' fraud, both the situation there presented and the one before us seem clearly to be so characterized if we are bound to hold the powers of a court

of equity thus restricted. *For the very duress by which the release or consent is obtained also prevents the coerced party from challenging before or at trial the statement or conduct of its adversary.* Thus in the original action the issue of duress never is before the court. *Indeed, the case differs little, if at all, from those where a witness is forcibly prevented from testifying, or an attorney is bribed to fight a losing battle or give his client false advice.*"

". . . We think, therefore, that no sufficient ground for dismissal of this action has been shown. Of course, we do not pass upon the existence of actual duress or coercion; that cannot be decided upon the mere face of the complaint."

"Reversed and remanded."

The above cited *Griffith* case clearly holds that the United States District Courts have jurisdiction and have assumed jurisdiction of probate matters similar to the instant case in similar jurisdictions throughout the United States. *The above cited case is definitely in point with the instant case, which is one of "extrinsic" fraud, and is almost identical with the kind of misrepresentation, duress, and coercion imposed upon Mrs. Smith. and it is clearly shown that Mrs. Smith's attorneys, and the Joint Administrators' attorneys who were also her attorneys, gave her false advice.*

See the cases of *Rogers* v. *Girard Trust Co.*, 159 F. 2d 239, (1947); and *Meredith* v. *City of Winter Haven*, 320 U.S. 228; 64 S.Ct. 7, at page 11, (1943), which are directly in point with the instant case.

The theory that the District Court did not have probate jurisdiction to consider the "defendant Mrs. Smith's amended answer and amended counterclaim" is groundless. The District Court's statement and ruling on page three (3) (which the Court of Appeals upheld) of the Opinion that the Joint Administrators objection to "Mrs. Smith's motion

for leave to file an amended answer and amended counterclaim'' in the within action should be sustained, is without any legal basis.

If the District Court has no probate jurisdiction to consider the ''Defendant Petitioner's amended answer and amended counterclaim'' (tendered in the District Court on February 23, 1957), then the District Court had no jurisdiction to consider the ''Order and Judgment,'' of March 5, 1952 and amended on May 1, 1952 of the Judge of the Jefferson County Court of Louisville, Kentucky, in favor of the Joint Administrators and their attorneys on a matter for the Joint Administrators' which is definitely a probate matter, to wit: (The two Trust Companies) ''Their purported Final Settlement of Accounts for the Estate of John A. O'Brien, deceased.'' How then could the District Court determine the accuracy of the different lawyers' fees for their different law suits filed in probate matters in the final settlement of the O'Brien estate if the court does not go into all phases of the probate matters?

All of the fees in the sum of $73,756.98 that the District Court awarded to the Joint Administrators, and all of the fees for their attorneys and law firms, which the Court of Appeals upheld is definitely a probate matter.

The law firms of Bruce & Bullitt; Bullitt, Middleton, Seelbach & Milner, and *Bullitt, Dawson & Tarrant, have been awarded three separate law fees for prosecuting trumped-up law suits in the estate of John A. O'Brien, deceased, since 1937,* a period of twenty-six years, all of which grew out of purported settlements of the said estate, and were all in a probate matter. *All of the law firms were employed by the Joint Administrators to delay for the Joint Administrators their filing of a final settlemet of the estate of John A. O'Brien, deceased, in the Jefferson County Court for 27 years, as we have clearly shown.*

The District Court stated on page 3 of its opinion that "Reference to previous litigations will be made only when it is pertinent to the determination of the motions before the Court in this case." No reference was ever made.

Also, the District Court set up on pages 2, 3 and 4 of its opinion, all of the law suits that have been filed and prosecuted in the estate of John A. O'Brien, deceased, and devoted three and one-half pages, single-spaced, to enumerating them as though that would be legal grounds for awarding the lawyers' fees to them. And the Court of Appeals accepted the District Court's findings of facts in his opinion. *It must be remembered that it was the joint Administrators who filed and caused to be filed all of those law suits except two, and the law suits are set up in detail, in Mrs. Smith's petition for rehearing on the District Court's opinion.* (R. II—1661a-1667a) Appendix C hereto.

Why should the estate of John A. O'Brien and Mrs. O'Brien-Smith pay for law suits none of which were for the benefit of the estate, filed by two Trust Companies the joint administrators over a period of twenty-eight years in order to keep from filing a final settlement of the accounts of the O'Brien estate and to cover up their acts of fraud in the sale of the partnership interest owned by Mrs. Smith, and their other acts of fraud. The record of this case shows that the Joint Administrators were in contempt of Court in defying both the Rulings of the Court of Appeals of Kentucky of June 8, 1948 supra and of the Jefferson County Court of February 24, 1949 in refusing to file a final settlement of their accounts of the O'Brien estate, for over fourteen years, and then they only filed a partial settlement on June 21, 1950.

The District Court and the Court of Appeals upheld his ruling violated KRS—in holding that Mrs. Smith is precluded from surcharging the Joint Administrators three

settlements of accounts of the Estate of John A. O'Brien filed in the Jefferson County Court on June 21, 1950, January 7, 1952 and August 7, 1952

The District Court admitted that there are two ways to challenge the final settlement of the accounts of an estate filed in the County Courts of Kentucky, and cited section 413.120 of the Kentucky Revised Statutes (Opinion R. II—1619a), which does not apply, and the District Court does not state correctly what the two ways are to challenge the final settlement of the accounts; neither the statute cited or the cases cited by the District Court thereunder sustain his statements thereunder. They do not hold that "It must be done by appeal if the person challenging has taken part in the proceeding leading to the approval of the account." They do not hold that "If the challenging party has not participated in the proceeding leading to the Judgment settling the final account, then the account may be surcharged at any time within five years in an appropriate action."

The Kentucky law is crystal clear on this subject and the two ways to challenge the final settlement of the accounts of an Estate by an Administrator are:

> **1. The party feeling aggrieved by the settlement of the executor's account may file exceptions and appeal to circuit court from county court's action thereon, or,**
>
> **2. The party may let the settlement be confirmed and approved by the county court without written exceptions and file an action in circuit court to surcharge the settlement on ground of error, mistake or fraud, within five years,**
>
> **as held in the case of Dees' Adm'r v. Dees' Ex'r et al, 249 Ky. 650, 61 S.W. (2d) 301-302 (Court of Appeals of Kentucky June 6, 1933). Also see Harper v. Lamb,**

Ballantine et al v. Harper et al., 202 Ky. 771, 261 S. W. 280-282 (Court of Appeals of Kentucky April 25, 1924). Scott's Heirs v. Kennedy's Executor, 12 B.M., 515; Stanbury's Admr. v. Robinson, 16 Ky. Law Rep. 310.

We are also supported in our contentions by the case of *Turley's Administrator* v. *Barnes, etc.,* 103 Ky. 127, 44 SW 446, 19 KLR (1808), which states:

"1. SETTLEMENTS OF FIDUCIARIES IN COUNTY COURTS—APPEALS FROM—EQUITY JURISDICTION.—**No appeal lies from an order of the county court confirming a settlement with a fiduciary where no formal written exceptions were filed to the settlement, such order not being a final order; and the fiduciary may thereafter bring his equitable action in the circuit court to surcharge and correct the errors in that settlement.**"

"2. Settlement by county courts of the accounts of fiduciaries are only prima facie, and may be surcharged in chancery by proper proceedings and purged of all errors where they were not contested in the county court. **Scott's Heirs v. Kennedy's Executor, 12 B.M., 516; Frazier v. Kavanaugh, Administrator, 4 Ky. Law Rep. 712; Bell v. Henshaw's Executor, 12 Ky. Law Rep. 674.**

By the provisions of **article 5, chapter 35, Kentucky Statutes,** the county judge is authorized to make settlements with personal representatives, and he is directed to make a report, in writing, of such settlement showing each item of debit and credit and the general result of all the evidence heard and vouchers **filed to the county court at its next regular term and noted of record, and section 1067 provides that this report shall lay over one term for exceptions to be filed by any person interested**; that if no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded; that if exceptions are taken, other evidence besides that reported may be heard,

and the court shall upon the whole case reject, alter or confirm the report, and if confirmed order it to be recorded; that any new evidence given in court must be reduced to writing and filed with the report; and that settlements so made shall be prima facie evidence between the parties.

In passing upon the question as to whether an order of a county court confirming a settlement, where no exception had been filed, was such a final judgment or order as to be the proper subject of revision and reversal by this court on any ground, this court, in the case of **Scott's Heirs v. Kennedy's Executor, 12 B.M., 515, said:**

'There is in such a case no judicial contest and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than of a judicial act. Second. There is no final adjudication or determination in favor of one person or against another or upon any question of property or personal rights. Third. The settlement and its confirmation are not conclusive, either upon the parties who may have been interested in opposing it or upon the court itself, which may order another settlement, in which errors in the first may be corrected. Fourth. **It is not conclusive, in any other court, but is only prima facie evidence, subject to be surcharged and falsified,** and may operate rather as a means of preserving evidence, and the preservation of which executors or other fiduciaries are entitled, than as a judgment; and being made by officers under the supervision of the court, it ought to have, and **has always had the effect of prima facie evidence, but can always** be questioned upon its merits by a bill in chancery.'

Also see the cases of *Scott's Heirs* v. *Kennedy's Ex'r, etc.*, 12 B. M. 510; 51 Ky. 510-517, 4 KLR 712 (1849); *Brady* v. *Cooper,* 12 Ky. Law Rep. 420 (1890); *Caplinger* v. *Pritchard,* 136 Ky. 349; 124 S.W. 352; *Andrews et al.* v. *McCarthy et al.,* 208 Ky. 25; 270 S.W. 466 (1925).

The statutes provide and the cases hold that unless written exceptions are filed in the county court to the final settlement of accounts of an estate by an administrator, that the party feeling aggrieved by the settlement of accounts cannot appeal to the circuit court. *When no written exceptions are filed in the County Court, courts of Kentucky* there is no Contest, the Court records the settlement as prima facie evidence of said settlement.

After the settlement is confirmed and approved, by the Judge of the county court without written exceptions, the aggrieved party may file an action in the circuit court to surcharge the final settlement of accounts on the ground of error and fraud, and force the administrators to account for what they owe the estate and the beneficiary thereunder.

The District Court and the Court of Appeals and the joint administrators admitted that Mrs. Smith did not file any written exceptions in county court. There is no proof in the record in the within case, that Mrs. Smith took any steps to prevent the Joint Administrators from filing a final settlement of their accounts of the Estate of John A. O'Brien because *the Court of Appeals had already ruled four times in favor of Mrs. Smith, and had ordered and directed the Joint Administrators to file a final settlement of the O'Brien Estate in the Jefferson County Court, at Louisville, Kentucky.*

Two of the Judges of the Jefferson County Court had already ruled in favor of Mrs. Smith, and ordered and directed the Joint Administrators to file a final settlement of the O'Brien Estate in County Court. The Joint Administrator had defied the six rulings of the Courts of Kentucky from March 1, 1936, until June 21, 1950, and refused to file a final settlement of their accounts of the O'Brien Estate until after all of the records in the O'Brien Estate from

March 1, 1934 through May 26, 1949, which had been filed in the office of the Clerk of the County Court were lost, stolen or missing. Then the Joint Administrators were anxious to proceed with hearings in the County Court on their so-called final settlement filed in the County Court, on June 21, 1950, which was not, and is not a final settlement under Kentucky law.

The District Court erred and the Court of Appeals upheld his ruling in holding that the defendant (Mrs. Smith) participated in the proceeding leading to the approval of the final settlement of the accounts of the Joint Administrators in the Jefferson County Court. There is no evidence in the record of the within action to uphold these findings. The decision in the Mandamus action in the Court of Appeals of Kentucky cited by the District Court and the Court of Appeals in their opinions and the excerpts therefrom (Opinion R. II—1620a-1622a) fully uphold Mrs. Smith in her contentions that the Joint Administrators settlement of accounts could not be a final settlement of accounts *for two reasons as long as (1) the Joint Administrators second settlement suit of the O'Brien Estate, was pending in the Jefferson Circuit Court and (2) as long as the Joint Administrators appeal was pending in the Jefferson Circuit Court from the "Rule Issued" against them in the Jefferson County Court, to file a final settlement of the O'Brien Estate. The said Opinion of the Court of Appeals of Kentucky does not uphold the District Court's ruling that Mrs. Smith is barred from surcharging the so-called final settlements of accounts of the Joint Administrators of the O'Brien Estate* filed in the Jefferson County Court on June 21, 1950, January 7, 1952 and August 7, 1952.

The District Court erred and the Court of Appeals upheld his ruling, in his statement that Mrs. Smith "took all

possible steps to prevent the settlement of the accounts filed by the Joint Administrators." **Mrs. Smith objected to the Joint Administrators having hearings on their so-called final settlement of the accounts of the estate of John A. O'Brien in the Jefferson County Court, until the records were legally restored, because all the records in the estate of John A. O'Brien filed by the Joint Administrators and counsel for Mrs. Smith, in the Jefferson County Court from March 1934, through May 26, 1949, were still missing and had not been legally restored and they were not restored until October 1954,** and **the Joint Administrators second settlement suit filed in the Jefferson Circuit Court on March 31, 1949,** and **an appeal from a "Rule Issued" against the Joint Administrators in the Jefferson County Court requiring them to file a final settlement of their accounts of the O'Brien Estate** in the Jefferson County Court, **from which the Joint Administrators filed an appeal in the Jefferson Circuit Court on May 26, 1949, were both still pending in the Courts of Kentucky.** *Any steps which Mrs. Smith would have taken until the above two cases were disposed of, would have been void, and she wanted to prevent the Joint Administrators from having further trumped-up hearings and wasting her cash held by them, and she was upheld in her contentions by the opinion in the Mandamus action in the Court of Appeals of Kentucky* in the case of *Smith v. Shamburger, Judge,* 314 Ky. 850, 238 S.W. (2d) 844 (1951), wherein in effect *it held that as long as the second settlement suit filed by the Joint Administrators, in the Jefferson Circuit Court, and their second appeal filed in the Jefferson Circuit Court were pending, that the accounting which the Joint Administrators had filed on June 21, 1950, was not and could not be a final settlement of the accounts of the estate of John A. O'Brien.* The Opinion of the Court of Appeals of Kentucky in the Madamus pro-

ceedings of *Smith* v. *Shamburger, Judge,* 314 Ky. 850; 238 S.W. 2d 844; stated that:

> "In petitioner's argument in her (Mrs. Smith's) briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court: (1) *A settlement suit, filed March 31, 1949, and* (2) *an appeal from the County Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former Judge of Jefferson County Court, directing the Co-Administrators to settle the estate. There has been no final disposition of either of these cases.*"
>
> "*If those items now the subject of controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting (Joint Administrators) would have been a final settlement.*"

We invite this Court to examine the Printed Transcript of Record of the within action. Mrs. Smith's Exhibits No. 32 and No. 33 (R. I page 678a through 1092a), which is a complete copy of a Certified Copy of the Transcript of Record in the Estate of John A. O'Brien, No. 24,146 from the office of the Clerk of the Jefferson County Court at Louisville, Kentucky from January 24, 1934, through October 1, 1951 *(after the records were legally restored in 1954),* which were filed by the order of the District Court in the within action on August 28, 1959.

The District Court admits and states that the defendant-petitioner (Mrs. Smith) did not file any exceptions to the so-called final settlement of the accounts of the Estate of John A. O'Brien filed by the Joint Administrators on June 21, 1950 in the Jefferson County Court (Opinion R. II—1618a) and further stated that "It would appear that she had no objections to such accounting, as such." His statement and rulings are inconsistent.

The District Court and the Court of Appeals approved the Joint Administrators settlement of the accounts of the O'Brien Estate in their "Exhibit No. 1" to their Complaint (R. I—46a-91a), *but denied Mrs. Smith the right to file the Joint Administrators' "Receipts and Disbursements" in the O'Brien Estate, which were filed with the Joint Administrators' settlement of accounts in the County Court as their Exhibit "A" on June 21, 1950, January 7, 1952 and August 7, 1952, all three of which were tendered with Mrs. Smith's First Amended Answer and her First Amended Counterclaim in the within action, as her Exhibits "D," "E" and "F," on February 23, 1957.* (R. I—233a-329a)

In the first amended answer and first amended counterclaim, *Mrs. Smith surcharged 221 specific items of disbursements, which the Joint Administrators improperly charged the O'Brien Estate,* in addition to the market value of her interest in the O'Brien Company and its four subsidiaries, as set forth on pages 164a-330a, Volume I, Printed Transcript of Record, filed as Appendix B hereto.

9. The District Court And The Court Of Appeals Upheld His Ruling On An Important Question Of Kentucky Law, In A Way In Conflict With Applicable Kentucky Decisions, And In Violation Of Kentucky Statutes.

The District Court and the Court of Appeals upheld his ruling in holding that Mrs. Smith should have filed an appeal from the "Order and Judgment" of the Judge of the Jefferson County Court of March 5, 1952, and amended May 1, 1952, and that the Joint Administrators and their attorneys are now entitled to a final judgment for the fees awarded them on March 5, 1952 and the amended Judgment of May 1, 1952, *without a trial of this case, and rul-*

ing that Mrs. Smith cannot now be permitted to challenge this settlement in this action. (R. II—1627a-1629a)

We have clearly shown that the defendant-petitioner, Mrs. Smith, could not legally appeal from the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and amended on May 1, 1952, to the Jefferson Circuit Court, for the reasons set forth herein, and in which she is upheld in her contentions in the cases cited thereunder. *The Judgment and amended Judgment were only prima facie evidence subject to be surcharged and falsified in the Jefferson Circuit Court within five years, from the date the final settlement of accounts was approved by the County Judge of the County Court on March 5, and May 1, 1952,* to-wit until May 1, 1957.

Mrs. Smith filed her motion for leave to file her first amended answer and her first amended counterclaim in the within action on February 23, 1957, and tendered therewith the said amended answer and amended counterclaim and Exhibits "A" through "G." (R. I—165a-330a) By affirming the District Court's denial of Petitioner's Motion, the Court of Appeals sanctioned a radical departure from accepted standards of judicial procedure.

The law is well settled in Kentucky that no appeal lies from an order of the County Court confirming a settlement with an administrator where no formal written exceptions were filed to the settlement in County Court, such order not being a final order. We are supported in this contention by the case of *Stanberry's Admr.* v. *Robinson*, 16 Ky. Law Rep. 310, which states:

> "This court again reviewed this question, referring to the case, supra, and held that the order approving the report of settlement made by the county judge and ordering it to be recorded, was not a final order.

"In the case at bar, no formal written exceptions were filed to the report made by the judge to the county court of his settlement with appellant, nor was there any contest made in that court as to the validity of the charges complained of, or any judgment rendered passing upon the rights of the parties with reference thereto. And, while we think it clear that if a party in interest shall file written exceptions to a settlement made by a fiduciary, and these exceptions are regularly tried by the county court upon their merits and a judgment entered sustaining or overruling them, the proper remedy to a party who feels aggrieved is by appeal as provided in section 978 (Kentucky Statutes Section); yet we do not think that the effect of that statute is to take away from parties who do not file such exceptions or in any way contest in the county court the validity of charges complained of, the right to have such alleged errors reviewed, by a bill in chancery.

"The mere formal entry of the order of confirmation of the settlement, no exceptions having been filed thereto, was not a final judgment conclusive of the rights of the parties from which appeal could be taken, and which precludes appellant from bringing his suit to surcharge and correct the alleged errors in the settlement and to restrain the prosecution of suits for the collection of the balance found to be due by the heirs growing out of such errors."

Nor was said "Judgment" a final order, but only prima facie evidence of the settlement as filed. *Brady* v. *Cooper*, 12 Ky. Law Rep. 420, p. 420 (1890):

"Upon the revision of our statutes county court settlements, made with fiduciaries, were declared to be only prima facie evidence . . ." and where (at page 421) "no exceptions appearing to have been filed by any one, such a settlement is only prima facie correct, even though the parties had notice, and it is not a final adjudication of the rights of the parties, and those

> complaining have the right, by original bill, to surcharge the settlement."

The Statute referred to in the above case was K.S. 1067, and is now within the purview of KRS 25.200, which specifically declares such settlements to be only *prima facie* evidence of their correctness. See also the case of *Andrews et al.* v. *McCarthy et al.*, 208 Ky. 25, 270 S.W. 466, p. 468 (1925); which said:

> "Such settlements are only prima facie evidence subject to surcharge, and they operate rather as a means of preserving evidence. *Scott's Heirs* v. *Kennedy*, 12 B.Mon. 510; *Bell* v. *Henshaw*, 12 Ky. Law Rep. 674; *Turley* v. *Barnes*, 103 Ky. 127, 44 S.W. 446, 19 Ky. Law Rep. 1808; *Caplinger* v. *Pritchard*, 136 Ky. 349, 124 S.W. 352."

Thus, the order of the Jefferson County Court of March 5, 1952, as amended May 1, 1952, could not have been appealed from to the Jefferson Circuit Court since no written exceptions were filed, by Mrs. Smith, but could only be subject to an action to surcharge and falsify as provided by Kentucky Statutes and Kentucky law, and the Kentucky Statutes cited herein, which the Petitioner was denied the right to do by the District Court which was upheld by the Court of Appeals.

It has been consistently held that County Courts, in Kentucky have no jurisdiction to entertain an action or enter a judgment for a recovery of money. This jurisdiction is vested in the Circuit Court, quarterly courts, police and magistrates courts. See *Wheedon's Adm'r* v. *Barrett's Guardian et al.*, 253 Ky. 737; 70 S.W. (2d); *Brady* v. *Brannon*, 134 Ky. 769; 121 S.W. 679, 680; *Central Trust Co., etc.* v. *Bennett*, 208 Ky. 281, 270 S.W. 821; also see the case of *Commonwealth* v. *Central Consumers Co.*, 91 S.W. 711.

The county courts in Kentucky, acting in probate matters are without jurisdiction to render a judgment for a recovery of money. A county court's jurisdiction is limited to an audit and determination of whether proper settlement has been made.

Let's be practical and at the same time adhere to the Statutes and laws of Kentucky. No statute or law in Kentucky can be found giving the county court jurisdiction to render a personal judgment for the recovery of more than $73,000.00 in fees, or in any sum. The Joint Administrators knew and were fully cognizant that they did not have a "final judgment." They, the attorneys for the Joint Administrators know how to collect a judgment, if they have a judgment. KRS 426.035 provides that "execution may be issued upon a judgment at any time until the collection of it is barred by The Statute of Limitations." Rule 69 of the Rules of Civil Procedure provide that process to enforce a judgment for the payment of money is by a writ of execution. Their remedy of recovery on a "Final" Judgment in Kentucky is clear and unequivocal. The so-called final judgment was March 5, 1952, the Defendant Mrs. Smith was solvent, yet on September 13, 1956, the Joint Administrators filed the within action in the Jefferson Circuit Court, which action simply amounts to a third settlement suit, and is the third settlement suit filed by them in the O'Brien Estate.

Why, if the two Trust Companies had a "final" judgment, did they file another settlement suit in Circuit Court, when all they would have had to do was issue a writ of execution on the judgment?

Again, the Joint Administrators were fully aware they did not have a "final judgment" within the meaning attributed to it by the District Court and the Court of Ap-

peals in granting Summary Judgments. Thus, the District Court rendered arbitrarily and summarily, a final judgment in this, the third original settlement suit of the O'Brien Estate, without a trial of the case, and the decision so rendered should have been reversed, and the Court of Appeals should have reversed it.

The District Court disregarded all of the facts which were briefed in this case, and *when the Joint Administrators and their attorneys spent ten or more days in the Jefferson County Court before a special Commissioner in July 1951, in December 1951, and January and February 1952, introducing records and testimony and obtaining the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and of May 1, 1952, there were no records in the estate of John A. O'Brien, deceased, to prove or disprove anything which the Joint Administrators were contending.* The above reasons set forth are why Mrs. Smith did not file any exceptions to any item in the Joint Administrators' so-called final settlement of accounts, because it was not and is not a final settlement of the accounts of the estate, even to this day, and beause *the records in the O'Brien Estate were not legally restored by the Court of Appeals of Kentucky until 1954.*

The hearings in the Jefferson County Court by the Joint Administrators, without Mrs. Smith or her attorney being present, amounted to nothing more than a Kankaroo Court Hearing, which the Joint Administrators had printed in one volume of 232 pages *which was not filed in the Record of this action in either Court.*

Mrs. Smith has proven that the only objections that she filed in the proceedings in the Jefferson County Court, and the only appearance made for her during that time, were the objections to the County Court Judge proceeding with

the hearings in the estate in July 1951, December 1951, and January and February 1952, for the above reasons and to save the O'Brien estate further expense when all of the records in the estate of John A. O'Brien from January 1, 1934, through June 2, 1949, were still missing. When the Joint Administrators gave bond and had the clerk of the Jefferson Circuit Court to issue a supersedeas on Judge Horace M. Barker, the then presiding Judge of the Jefferson County Court, the supersedeas was issued at the request of the Joint Administrators and their attorneys and their names are endorsed thereon by their attorneys, R. Lee Blackwell and Irvin Marcus, (see Defendant's Exhibit "G," filed in the District Court on August 28, 1959) by order of the Court. (R. I—329a-330a)

The District Court violated Rule 15 of the Federal Rules of Civil Procedure and the Court of Appeals upheld his rulings in overruling the defendant's (Mrs. Smith's) motion for leave to file her first amended answer and amended counterclaim, and stated that the amendment asserted no claims or defense cognizable by the Court in which the case is pending.

We have clearly shown that *Mrs. Smith could not have appealed to the Circuit Court since she did not file any exceptions to the final settlement of accounts in the Jefferson County Court, and that her only remedy was to surcharge and falsify the final settlements of accounts, which were approved by the Jefferson County Court on March 5, 1952, and amended Judgment May 1, 1952, thus becoming prima facie evidence of a settlement.*

The District Court erred and the Court of Appeals upheld his rulings in granting the Joint Administrators Motions for Summary Judgments as to the Defendant Mrs. Smith's original counterclaim, and the order entered thereon on April 20, 1961. (R. II—1696a)

The District Court is in error, and the Court of Appeals upheld his ruling *the Joint Administrators were not discharged and released from further liability under their bonds, in the amended Judgment of May 1, 1952, filed in the Jefferson County Court.* (R. I—34a-35a), in the O'Brien Estate.

10. The District Court Violated Rule 15 Of The Federal Rules of Civil Procedure and the Court of Appeals Upheld His Ruling In Denying The Defendant-Petitioner Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer And Her Second Amended Counterclaim, Filed On May 15, 1961.

On May 15, 1961, Mrs. O'Brien-Smith filed a motion for leave to file her second amended answer and her second amended counterclaim. The District Court did not rule on this motion until on November 9, 1962, when he then ruled that the proposed amendment does not avoid the prior ruling of the District Court, meaning the opinion, rendered on March 4, 1961, and his order thereon filed and entered in the within action on April 20, 1961. (R. II—1607a-1629a; 1696a)

The cases cited by the District Court at the hearing on November 9, 1962, (R. II—2168a-2172a) do not sustain his ruling thereon, which the Court of Appeals affirmed, because in the within case, *the District Court did not permit Mrs. O'Brien-Smith to file a single amendment to her original answer and her original counterclaim, and her second amendment which was tendered for filing was tendered on May 15, 1961,* and the Court did not rule on said motion until on November 9, 1962. Thus, the *second amendment was tendered one year and six months before the District Court ruled on it,* and granted the Joint Administrators' "Second Motion for Summary Judgments," on November 9, 1962. (R. II—2090a-2093a)

The photostatic copies of certified copies of the Defendant-Petitioner Mrs. O'Brien-Smith's Exhibits No. 42 through 75, (except Exhibit No. 51) which were attached to "Mrs. O'Brien-Smith's Second Amended Answer And Her Second Amended Counterclaim," which were tendered with *"Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer And Her Second Amended Counterclaim," filed in the within action on May 15, 1961, were of vital importance in further showing that the Joint Administrators fraudulently misrepresented the market value of Mrs. O'Brien-Smith's partnership interest in Edward J. O'Brien & Company and its four subsidiaries, in the many different respects as enumerated therein;* and in addition to Mrs. O'Brien-Smith being entitled to receive the difference between what the Joint Administrators sold her interest for, and the market value of the interest. (R. II—1703a-1989a)

In the Second Amendment tendered *Mrs. Smith alleged that the Joint Administrators without disclosing to her, joined with the brothers of John A. O'Brien and transferred to a former partner thousands of dollars worth of stocks and bonds which were owned by, and in the name of Edward J. O'Brien & Company, in order to decrease Mrs. Smith's interest in the O'Brien Company, when the former partner had already been paid in full for her interest in 1928, before this transfer was made,* Mrs. Smith's Exhibits No. 61, 62, 63 and 64 (R. II—1722a-1724a; 1941a-1947a), which definitely avoid the District Court's ruling in his opinion of March 4, 1961, which was affirmed by the Court of Appeals.

Further, *Mrs. Smith set out in the Second Amendment a recapitulation of the additional values which the Joint Administrators owe her for her interest in Edward J. O'Brien & Company and its four subsidiaries,* both on the

basis of 21.25% and on the basis of 28.33%, (R. II—1716a-1719a) *which was not done in either her first Counterclaim filed, or her first Amended Counterclaim tendered.* (R. I—165a-330a)

When the *District Court* and the Court of Appeals allowed the Joint Administrators and their attorneys their fees they *disregarded the written agreement that the Louisville Trust Company had with John A. O'Brien before his death, dated July 7, 1933, to act as administrator for 1½% on the principal,* (Mrs. Smith's Exhibit No. 55, R. II—1927a-1928a) *and the letter from the Citizens Fidelity Bank & Trust Company agreeing to act as administrator for 1½% of the principal of the Estate (Mrs. Smith's Exhibit 56,* R. II—1929a-1930a); *also the affidavit of Ernest Kampfmueller in reference to administrators fees* of $14,000.00 *and attorneys fees for representing the Estate for final settlement for* $25,000.00, *and swore to the State Tax Commissioner and the Internal Revenue at Washington, D. C., that those fees would be for full settlement of the O'Brien Estate.* (See Mrs. Smith's Exhibits 57, 58, 59, 60, R. II—1931a-1940a) All of these exhibits were tendered with Mrs. Smith's Second Amended Answer and Second Amended Counterclaim, which definitely avoid the District Court's first ruling on March 4, 1961.

Under the doctrine of recoupment, Mrs. Smith is entitled to prove that the *Joint Administrators under the law are not entitled to any compensation or fees as Joint Administrators, for representing the Estate of John A. O'Brien;* and *further that their attorneys are not entitled to any fees for representing the Joint Administrators of the Estate of John A. O'Brien, in filing three settlement suits in the Estate of John A. O'Brien, and several appeals, four of which Mrs. O'Brien-Smith won by the opinions of the Court of Appeals of Kentucky, supra.*

Further, *the Joint Administrators are not entitled to any compensation or fees for filing an Appeal to the Jefferson Circuit Court from the "Rule Issued" against the Joint Administrators, by the Honorable Horace M. Barker, Judge of the Jefferson County Court on February 24, 1949,* to file a final settlement of the O'Brien Estate in the Jefferson County Court on June 5, 1949, when the Joint Administrators *were already thirteen years in default of their statutory duties under KRS 3858, which is now KRS 25.175.*

Neither the Joint Administrators nor their attorneys are entitled to any legal fees, or their expenses involved, in any of the law suits filed and prosecuted in the estate, unless prosecuted for the benefit of the estate. None of the suits were beneficial to the estate, and the estate therefore, should not bear the burden of this continued, unnecessary and expensive litigation. See *Beeler & Others, Heirs of Hill* v. *Hill's Executor and the other Heirs,* 35 Ky. 37 (1837).

11. The District Court And The Court Of Appeals Ruling, Decided An Important Question of Kentucky Law In Conflict With Applicable Kentucky Decisions In Overruling Defendant Mrs. O'Brien-Smith's Motion For An Order Requiring The Joint Administrators To Pay Into The District Court The Remaining Cash Assets Of $30,788.86 Held By Them And Belonging To The O'Brien Estate.

The Joint Administrators admit holding a balance of $30,788.86 in cash assets belonging to the O'Brien Estate (R. I—41a-45a). The District Court erred in denying Defendant's motion for an order that this money be paid into Court, and the Court of Appeals upheld his ruling. See grounds stated in Defendant's written Motion (R. I—117a-119a). The Joint Administrators contend they have finally settled the estate and were discharged on their bonds. *The facts are that this estate has not been settled and the ad-*

ministrators have not been discharged on their bonds. Opposing counsel argued that this money is a "credit", apparently inferring that as such it belongs to the Joint Administrators. (R. II—1361a.) In truth and in fact, and in every legal sense, these funds are assets of the O'Brien Estate, which have never been disbursed nor distributed. In their very complaint in this action, the Joint Administrators set up "Balance remaining in hands of administrators . . . $30,788.86 (R. I—41a), referring to this amount as the "balance of Mr. O'Brien's Estate which remains in said Joint Administrator's hands . . ." (R. I—45a). None of the acccuntings made to date, including the so-called "final settlement", constitute or can be construed under Kentucky law a final settlement of the O'Brien Estate. *So long as assets are retained in the Joint Administrators' hands, there is a continuing trust yet to be administered and finally settled. The Joint Administrators' Complaint in this suit is, in effect, nothing more than an action for the settlement of the O'Brien Estate; Stanberry's Adm'r. v. Robinson, etc.,* 16 KLR 309, 27 S.W. 973; *Com. v. Graves County,* 159 Ky. 455, 167 S.W. 411.

12. The District Court And The Court Of Appeals Upheld The Joint Administrators In Violating KRS 395.310 (Ky. Sts. 3859) In Failing To Require The Joint Administrators To Pay Interest Compounded At The Rate Of (6%) Six Per Cent Per Annum, On Cash Retained By Them Belonging To Mrs. Smith Since 1936.

The Joint Administrators owe $84,631.65 for interest on cash belonging to the O'Brien Estate and Mrs. Smith, held by them since February 11, 1936. *The payment of interest by administrators on surplus assets held in their hands two years after expiration of their qualification has been obligatory by statute in Kentucky since 1867, and is the law today, KRS 395.310 (Ky. Sts. 3859),* and *after the two years, pay-*

ment of interest is mandatory. The Joint Administrators paid no interest on the assets held, belonging to the Estate of John A. O'Brien, as enumerated in the First Amended Counterclaim (R. I—187a-221a; 223a-224a), *in the Second Amended Answer and Second Amended Counterclaim* (R. II —1745a). The monies of the O'Brien estate were commingled with the money of the banks of the Joint Administrators, on which interest is legally due and payable. See *Farmers Bank & Trust Co.* v. *Stanley*, 190 Ky. 762, 228 S.W. 691 (1921); *Steel's Adm'rs* v. *Lewis*, 32 KLR 439, 105 S.W. 1191; *Howe* v. *Winn*, 150 Ky. 667, 150 S.W. 842.

In June, 1946, the Joint Administrators admitted that they still had in their possession, Twenty Five Thousand ($25,000.00) Dollars in cash belonging to the Estate of John A. O'Brien, and Mrs. Smith, on which they have not to this day paid any interest thereon, to the O'Brien Estate or to Mrs. O'Brien-Smith.

In June 1946, the Joint Administrators were still holding and refusing to turn over to Mrs. O'Brien-Smith certain stocks owned by John A. O'Brien, at the time of his death which Mrs. Smith inherited, which had a market value of over Fifty Two Thousand Seven Hundred Twenty One Dollars and Five Cents ($52,721.05).

In order to get the above stocks, illegally withheld by the Joint Administrators for over twelve years and six months, Mrs. O'Brien-Smith was required to give to the Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, an additional Fifteen Thousand ($15,000.00) Dollars cash from her own funds for them to retain for lawyers and executors fees. No interest has been paid on this $40,000.00, and when the interest due is added to the $40,000.00, it makes a total of $124,631.95 cash remaining in the hands of the Joint Administrators belonging to Mrs. Smith on November 9, 1962, when the District Court

ruled and the Court of Appeals upheld his ruling, that the Joint Administrators may retain the cash belonging to Mrs. Smith. *To this day, the Joint Administrators are still holding that amount of cash and have not paid any interest thereon.* They claim that they have spent all of this amount except thirty thousand seven hundred eighty eight dollars and eighty six cents ($30,788.86), for expenses and briefs *in law suits against the Estate and Mrs. Smith, all of which were lost by the Joint Administrators and won by Mrs. Smith in the Court of Appeals of Kentucky by four printed decisions, supra.* By the District Court's Order and Summary Judgments of November 9, 1962, and the Court of Appeals Judgment of April 17, 1964, they approved the Joint Administrators refusal to pay interest without ruling thereon, and ruled that they may retain the remaining amount of cash in their hands of $30,788.76 as a credit against the $73,756.98 awarded to them plus 6% interest by the District Court, the Court of Appeals modified the ruling of the District Court only, as to interest on the Judgments should be from November 9, 1962, instead of from May 1, 1952, and in so doing admitted that the Judgments of May 1, 1952 of the County Court was not a bona fide Judgment.

13. **The District Court And The Court Of Appeals Upheld The Ruling, In Overruling The Motion Of Mrs. Smith, To Bar William Marshall Bullitt, And All Other Members Of The Law Firm Of Bullitt, Dawson & Tarrant From Representing The Louisville Trust Company And The Citizens Fidelity Bank & Trust Company, The Joint Administrators, Against Her In The Within Action, Because They Represented Mrs. Smith From January 1934 To February 12, 1936.**

The District Court and the Court of Appeals upheld his ruling in overruling Mrs. O'Brien-Smith's motion for an

order barring William Marshall Bullitt and all other members of the law firm of Bullitt, Dawson & Tarrant from representing the Plaintiffs Joint Administrators in this action against her. (R. I—108a-114a)

Following John A. O'Brien's death in 1934, Mrs. O'Brien-Smith engaged William Marshall Bullitt and his law firm (then Bruce & Bullitt, now Bullitt, Dawson & Tarrant) to represent her interest both in the final settlement of the O'Brien Estate, and in obtaining the proceeds of the insurance left her by her husband. Bullitt accepted this employment for himself and his firm to represent her. Thereafter, some two years later, on February 11, 1936, these lawyers were paid by the Joint Administrators, from cash in their possession belonging to Mrs. O'Brien-Smith, for legal services, the sum of twenty three thousand three hundred thirty three dollars and thirty three cents ($23,-333.33), although to that time no suits had been filed in the Estate, nor any pleadings or other papers of any kind prepared or signed by said attorneys on behalf of their client, Mrs. O'Brien-Smith. At the very outset, these lawyers (Bullitt and his firm) were already representing other persons and business concerns, whose interests directly conflicted with and whose causes directly opposed those of Mrs. O'Brien-Smith. (See Statement of Facts in this Petition. Yet there was no disclosure as required by the professional canon of ethics to his client Mrs. O'Brien-Smith, by Bullitt or any other member of his law firm, of the circumstances of his relations to these opposing parties, or of any interest in or connection with the subject matter such as would, without question, have influenced his client Mrs. O'Brien-Smith to choose other counsel. However, this clandestine violation of ethics, rendering nugatory at first blush the requirements and expectations of first duty, loyalty and strict allegiance to contend for his client,

Mrs. O'Brien-Smith, was not all. *After these lawyers were paid as above stated, they then refused to further represent Mrs. O'Brien-Smith, and thereafter and have since, openly and actively, represented the Plaintiffs-Joint Administrators herein on the opposing side and in direct conflict to the causes of Mrs. O'Brien-Smith. It is elementary to members of the legal profession that not only is it unprofessional to represent conflicting interests, but the obligation to represent a client with undivided fidelity forbids also the subsequent acceptance of employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.* (See Canon 6 of Professional Ethics—American Bar Association).

Because of the unfair advantage, the inequities and resulting detrimental effect upon the Defendant Mrs. O'Brien-Smith's cause in the within action, brought on by these attorneys' activities as related, the Motion for an Order barring their representation for and on behalf of the Plaintiffs Joint Administrators should have been sustained. (R. I—108a-114a).

14. The District Court Erred In Its Order And Summary Judgments In Allowing Interest On The Joint Administrators' Fees And Their Attorney's Fees On Their Alleged Over-Payments To Mrs. O'Brien-Smith, Filed And Entered On November 9, 1962.

In 1936 the Joint Administrators kept from the sale of Mrs. O'Brien-Smith's partnership interest $100,000.00 in cash to use for administering the O'Brien Estate. In addition, they held some $52,000.00 in personal stocks of John A. O'Brien, deceased. In 1946, ten years later, some $75,-

000.00 had been expended by the Joint Administrators, leaving a cash balance of $25,000.00. Mrs. O'Brien-Smith brought an action in Circuit Court at Louisville, Kentucky for delivery of the personal stocks, valued at $52,000.00, and the cash balance, plus interest on the same. The Joint Administrators resisted this demand and asked for an additional $15,000.00 to add to the $25,000.00 cash in hand, making a total of $40,000.00 the Joint Administrators asserted they needed for winding up the estate and paying all the remaining expenses to be incurred in the estate, including their own and their attorneys fees. The Circuit Court awarded Mrs. O'Brien-Smith the personal stocks, and directed her to pay to the Administrators the additional $15,000.00. Mrs. Smith denied any of the $40,000.00 was due or needed to settle the estate and demanded interest on all the monies held by the Administrators.

The Joint Administrators owe the O'Brien Estate interest under provisions of KRS 395.310, in the amount of $84,631.65. Had the $40,000.00 cash held in their hands, and which they said was sufficient in 1946, been invested as required by law, there would, by this date, be more assets on hand than the amount they now claim and certainly no deficit as they now allege.

The statute relating to overpayment cited in the Complaint (KRS 396.140) does not apply in the within case. See the case of *Beeler &c.* v. *Hill's Ex'r., &c.,* 35 Ky. 37, (Vol. V Dana 37) is controlling.

15. The District Court Erred in His Ruling That The Issues Presented By Mrs. Smith's Original Counterclaim Are Barred By The Statute Of Limitations, And The Court Of Appeals Did Not Rule On This Issue.

The District Court erred in ruling that the issues presented by Mrs. Smith's Original Counterclaim are barred by the Statute of Limitations.

The Court of Appeals opinion did not rule on the issue of the Statute of Limitations and on this issue they stated as follows:

> "As an additional basis for dismissing the counterclaim, the District Court held that the right of action asserted therein was barred by limitations. In view of our holding on the question of res judicata, we do not find it necessary to discuss in this opinion the question of the statute of limitations."

The District Court erred in holding that Mrs. Smith cannot sue the Joint Administrators as principals or as sureties on their bonds, on page six (6) and seven (7) of its opinion, and on page four (4) and five (5) of the said opinion sets out the Statute of Limitations of Kentucky. (R. II—1607a-1629a.)

The Statute of Limitations of Kentucky upholds Mrs. Smith's contentions that she can sue the Joint Administrators for fraud on their bonds, as she alleged in her original counterclaim filed with her original answer in the within action on November 12, 1956. (R. I—134a-139a.)

The District Court sets up the Statute of Limitations of Kentucky which distinguish between different types of actions, and he admits that under section 413.090 Kentucky Revised Statutes (Carroll's Ky. Stats. Section 2514) that Mrs. Smith had fifteen (15) years after the cause of action first accrued in which to file suit against the Joint Administrators on their bond.

The District Court further sets up fourteen (14) other sections of the Kentucky Revised Statutes which have no application to the issue in the within action and states that it is necessary for the Court to determine when the de-

fendant's cause of action for the alleged fraud arose and the nature of the cause of action which she asserts.

The District Court erred in holding that Mrs. Smith pursued her claim of fraud against the Joint Administrators in the Rescission Suit which was against the O'Brien brothers only in the case of O'Brien v. O'Brien, 294 Ky. 793, 172 S.W. 2d 595 (1943); and he cites an excerpt from the Rescission Suit, which in no way supports his ruling that Mrs. Smith knew that the Joint Administrators were guilty of fraud in 1937, and in no way does it prove that she claimed fraud against the Joint Administrators in the Rescission Suit.

The District Court erred in holding in his opinion that there had been a number of lawsuits all pointed toward the determination of the issue of fraud in the settlement between the defendant and the other interested relatives and the Administrators, because none of the lawsuits which have been prosecuted in the Estate of John A. O'Brien ever raised the issue of fraud against the Joint Administrators of the O'Brien estate.

The District Court further held that twenty (20) years had passed from the time of Mrs. Smith's discovery of the alleged fraud to the time of the commencement of the within action and that she cannot sue the Joint Administrators as principals or as sureties, and that she was barred my the Statute previously cited which allowed her only five (5) years after the cause of action accrued, and that Mrs. Smith is barred by the Statute of Limitations for the reasons set forth in his opinion, (R. II—1608a-1614a).

Mrs. Smith did not discover that the Joint Administrators were the ones who were guilty of fraud, misrepresentation, negligence, mismanagement and failure to disclose to her the market value of her interest in the Edward J.

O'Brien Tobacco Company, and its four subsidiaries, and the O'Brien brothers were not alone guilty of fraud until after the final decision in the case of O'Brien v. O'Brien in May, 1944, supra, and until after the so-called final settlement filed by the Joint Administrators in 1950 in the Jefferson County Court, and approved by the Judgment of the Jefferson County Court on March 5, 1952 and the Amended Judgment on May 1, 1952, and she filed her original counterclaim herein on November 12, 1956. In the Rescission Suit, the Court of Appeals of Kentucky held in effect that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the book value or the market value of her partnership interest because she had "competent and trustworthy counselors", holding in effect that the Joint Administrators should have ascertained the market value of her partnership interest in Edward J. O'Brien Tobacco Company, and its four subsidiaries, and both of the vice-presidents of the two trust companies, the Joint Administrators herein under oath, stated that they made no investigations whatsoever and took the word of Edwin J. O'Brien, Jr., as to what Mrs. Smith's partnership interest was worth.

Further, Mrs. Smith did not know that the Joint Administrators had converted her funds which was in their possession to their own use, and that they had transferred several hundreds of thousands of dollars worth of stocks from the O'Brien Company to one of the former partners, until after they filed their first partial settlement of the O'Brien Estate in the Jefferson County Court on June 21, 1950. Mrs. Smith's original counterclaim was filed in the within action on November 12, 1956, just six years five months and twenty one days after the Joint Administrators purported final settlement of the O'Brien estate was filed in the Jefferson County Court, on June 21, 1950, and within five years from the date the Judgment was filed on March

5, 1952, and the Amended Judgment was filed on May 1, 1952, in the Jefferson County Court.

The District Court erred in its ruling that the defendant Mrs. Smith's original counterclaim relating to the sale of the decedent's partnership interest is barred by the Statute of Limitations. The District Court asserted that if Mrs. Smith had any cause of action upon her counterclaim it must be based upon the Joint Administrators' bonds. The District Court stated in his opinion that an action upon an administrators' bond is governed by KRS 413.090, and that the counterclaim of Mrs. Smith is barred by that statute, because Mrs. Smith did not commence an action thereon within 15 years after her cause of action "accrued". The cause of action could not nor can it accrue until the final settlement of the accounts of an estate are filed by the Joint Administrators, in the County Court.

To properly understand the legal effect of an administrator's bond, it is necessary to examine the statutory provisions pertaining not only to the bonds, but to the duties of the administrator for the performance of which the bond is required. The requirements of a fiduciary bond, in Kentucky, are fixed by the Kentucky Revised Statutes and under KRS 62.060, it provides that the bond of a fiduciary shall be a covenant from the principal and surety "that the principal will faithfully discharge his duties". Among the "duties" specified by statute to be performed by the personal representative or an administrator are these "musts".

KRS 25.175 provides:

> (1) He "must" one year after his appointment, and annually thereafter until otherwise provided by law "Render An Accounting Of The Execution Of His Trust To The Court By Which He Was Appointed."

1. The Joint Administrators of the O'Brien estate did not comply with the provisions of this Statute, they did not file

even a partial settlement of the said estate until on June 21, 1950.

(2) He "must" render an accounting at any other time upon the order of the court.

2. The Joint Administrators refused to comply with the order of Judge Mark Beauchamp of the Jefferson County Court, to file a final settlement of the O'Brien Estate on March 1, 1936.

3. The Joint Administrators refused to comply with the four opinions and mandates of the Court of Appeals of Kentucky, to file a final settlement of the O'Brien Estate in the Jefferson County Court.

4. The Joint Administrators refused to comply with the "Rule Issued", against them, to file a final settlement of the O'Brien Estate, by Judge Horace M. Barker on June 5, 1949, and filed an appeal therefrom to the Jefferson Circuit Court on May 26, 1949, which was not finally determined until October 1954.

(3) "AT THE EXPIRATION OF HIS TRUST SUCH FIDUCIARY MUST FULLY ACCOUNT FOR AND PAY OVER THE TRUST ESTATE TO THE PERSON OR PERSONS ENITLED THERETO," and

5. The Joint Administrators did not comply with this Statute in that they did not pay into Court or to Mrs. Smith the sole beneficiary of the O'Brien estate, the cash held by the Joint Administrators in excess of One Hundred Twenty Four Thousand Six Hundred Thirty One Dollars and Ninety Five Cents ($124,631.95), when they filed the purported final settlement of the O'Brien estate, and they have not yet paid her this amount or accounted for same in any Court.

KRS 62.070 further provides:

"Recovery on the bonds shall not be restricted to the duties or responsibilities belonging to the office, trust

> or employment at the date the bond is executed, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed."

The bond of the plaintiffs Joint Administrators covenanted that they would faithfully discharge all the above duties. It is of no consequence that the Joint Administrators are corporate fiduciaries, because a corporate fiduciary is expressly made subject to all the duties and responsibilities as individual fiduciaries except, upon the bond of a corporate fiduciary, the only security, unless otherwise required, shall be "the capital stock," KRS 287.220. In the instant case the bond of the plaintiffs Joint Administrators contains no surety other than "the capital stock" of the two trust companies. No "capital stock" was deposited as security, when the Joint Administrators in the instant case executed their bonds and no necessity arises for construing the meaning or effect of the statute providing that upon the bond of a corporate fiduciary the only surety required is the capital stock. It is sufficient here to consider that the bonds are executed by plaintiff trust companies as principals, and they are proceeded against here as principals. No complications or sureties are involved, and the liability asserted against the plaintiffs Joint Administrators on Mrs. Smith's original counterclaim is their liability on the bond as principals. Under KRS 62.070 recovery against the surety is limited to the penalty fixed in the bond, "but recovery against the principal shall not be limited by the penalty fixed in the bond."

The statute therefore places upon the personal representative the duty to make annual court settlements of his accounts, and to pay over the trust estate to the persons entitled thereto "at the expiration of his trust", and the official bond of the personal representative covenants that he will faithfully do so. Manifestly, if the personal repre-

sentative fails to account for and turn over the property to the persons entitled thereto "at the expiration of his trust" he commits a breach of his bond. Since he engages by his bond to turn over the estate "at the expiration of his trust" the cause of action on his bonds accrues "at the expiration of his trust." The question immediately posed is, "has there been an expiration of plaintiffs' Joint Administrators' trust in the instant case?" If so, when did their duties as personal representative cease and determine? The answers to the questions are found in an exhaustive annotation in 44 ALR (2d) p. 808, wherein it is stated that, by the weight of authority, **the statute of limitations begins to run against the action on a bond of a personal representative from the date on which occurs a final judicial ascertainment of the liability of the personal representative. In 44 ALR (2d) pp. 808, 809, it is stated:**

> "By the weight of authority the statute of limitations ordinarily begin to run against an action on the bond of a personal representative from the date on which occurs a final judicial ascertainment of the liability of the representative." . . .
>
> "Probate practice varies widely, of course, from jursidiction to jurisdiction. Usually the administration of a decedent's estate involves orders settling the intermediate or final accounts of the personal representative, orders directing the manner of distribution of the assets of the estate, and, at least sometimes, orders for the formal closing of the estate. Exhibiting a wide range of variations as to details, a number of cases support the proposition that limitations against an action on the bond of an executor or administrator —at least in the absence of specific circumstances requiring a different conclusion—commence to run at the time of the final judicial ascertainment of the liability of the personal representative to heirs, distributees, or creditors. This may mean the date of the only decree of distribution entered in the particular

estate; it may mean the date of the last of a series of decrees or orders for distribution; it may mean the date of the order approving the final account of the representative; it may mean the date of a decree surcharging the representative and then settling his accounts as corrected.

"As noted before, variation as to details is great. But the following cases may be cited as supporting the broad conclusion that what is to be properly regarded as the final judicial ascertainment of the principal's liability marks the time limitations commence to run against an action on the official bond."

In *Hargis* v. *Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, 9 Ky. Law Rep. 920, the court made the observation that the administrator's duties were not terminated until final settlement of his accounts, saying:

"It seems to us therefore—First that the disposition of the estate in pursuance of the settlement made in 1867, of which the apportionment of the land is to be regarded as a part, Was An End Of The Executorial Duties Of The Sons" . . .

"Applying this principle here, we see no reason why the lapse of time does not bar the appellants cause of action. It Arose When The Settlement And The Division Under It Were Made, And From That Time The Statute Began To Run—The limitation of 15 years applying to the principal obligors, and 5 years to the sureties."

Likewise in *Hargis* v. *Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, the court made the observation that the administrator's duties were not terminated until final setlement of his accounts saying:

"This rule could not have been applied to an administrator regardless of the present statute as he was never considered as such a trustee, After The Settlement Of His Account And The Distributable Share Of The Heir Ascertained."

Also see the cases of *Kitchen's Ex'rs.* v. *King,* 255 Ky. 235, 73 S.W. 2d 45; *Anspacher* v. *Utterback's Adm'r,* 252 Ky. 666, 68 S.W. 2d 15; *Blackwell et al* v. *Fidelity and Deposit Co.,* 163 Ky. 76, 173 S.W. 321; *Blake* v. *Wolfe,* 105 Ky. 380, 49 S.W. 19, 20 Ky. Law Rep. 1212; *Wren's Exr* v. *Wren's Ex'r,* 126 Ky. 704, 104 S.W. 737, 31 Ky. Law Rep. 1096, and *Rison et al* v. *Shepherd et al.,* (1945) 299 Ky. 693, 186 S.W. (2d) 648.

The statute here involved, KRS 413.090(3), applies to actions upon the bonds of receivers, as well as personal representatives. In the case of *U.S. Fidelity & Guaranty Co.* v. *Shields,* 157 Ky. 371, 163 S.W. 203, the court held that the statute of limitations against an action upon the bond of a receiver did not commence to run until the receiver had made a settlement of his account, or had made a report to the court. The court there said:

> "The plea of the statute of limitations is unavailing. The plaintiff had no cause of action against the receiver, while he held the fund subject to the order of the court. He had never settled his accounts or made a report to the court, and until the court determined to whom the money was to be paid, no action could be brought. The seven year statute bars an action against the surety after seven years from the time the cause of action accrued. But the statute does not begin to run until the cause of action accrues. Here the cause of action did not accrue until shortly before this action was brought. The cause of action against the surety accrues at the same time as it does against the principal."

Likewise in the case of *Tucker* v. *Aetna Casualty & Surety Co.,* 270 Ky. 723, 110 S.W. (2d) 649, the court held that the right of an heir to sue for his distributable share of the estate of a decedent accrues upon the settlement of the estate. Referring to the case of *Hargis* v. *Sewell's Admr., supra,* the court said:

> ". . . It also was held that when the distributable portion of the estate had been ascertained by the settlement, any heir had the right to sue for his distributable share, and the statute of limitations would run from the accrual of the cause of action to the same effect. See *Schwerman* v. *Commonwealth*, 99 Ky. 296, 38 S.W. 146, 18 Ky. Law Rep. 585; *Grant County Building & Loan & Savings Association* v. *Lemmon*, 78 S.W. 874, 25 Ky. Law Rep. 1725; *Commonwealth* v. *Sammons*, 180 Ky. 403, 202 S.W. 885; *United States Fidelity & Guaranty Company* v. *Shields*, 157 Ky. 371, 163 S.W. 203."

The reasons for adopting the date of accounting and settlement for the commencement of the statute of limitations are obvious, and sound. No one can know the amount of his or her distributable share in decedent's estate until the personal representative has made an accounting and a final settlement of an estate. *And the finality of such accounting and final settlement, may have to await the final judgment of the court in the suit to surcharge the settlement for negligence or mismanagement.* The Joint Administrators do not claim, and cannot claim that they made any final court settlement of their accounts in the estate of John A. O'Brien, deceased, until March 5, 1952, and May 1, 1952. And, although their partial settlement is in the amended answer and amended counterclaim tendered hereby by Mrs. Smith, on the grounds of misrepresentations, negligence, threats, coercion, undue influence and mismanagement in the handling of the estate and a breach of trust, the 15 year period from the date of the final settlement will not expire until 1967, and is not barred. The sale of decedent's partnership interest by the Joint Administrators comprises an item that must be taken into consideration on a final settlement and accounting of the plaintiffs' Joint Administrators. As long as the Joint Administrators assume and continue to act as such administrators, and have cash in

their hands belonging to the estate, so long the counterclaim may be asserted, and it is not barred.

The so-called Judgment of March 5, 1952 under paragraph eight stated, "The Administrators be, and hereby they are, discharged and released from any, and all, further liability under their bonds as such," but when the Judgment was amended on May 1, 1952, the Joint Administrators were not discharged and released from any, and all, further liability under their bonds as such and paragraph eight was amended to read:

> "EIGHTH: The accounts of the Joint Administrators be, and hereby they are, approved and confirmed, in all respects.
>
> The Estate of John A. O'Brien, deceased, be, and the same hereby is, finally settled.
>
> The Joint Administrators be, and hereby they are, authorized and empowered to sue, and to take any and all steps necessary or proper to recover from Patricia O'Brien Smith (1) All the amounts adjudged against her in Paragraph SEVENTH of this Judgment; and (2) Any and all additional amounts constituting any over-payment by the Joint Administrators to the said Patricia O'Brien Smith, which aggregate amounts so recovered shall be sufficient for the Joint Administrators to pay in full all obligations of the Joint Administrators and of the Estate, as authorized in Paragraphs FIFTH and SEVENTH of this Judgment.'
> May 1, 1952
>
> Boman L. Shamburger,
> Judge."

(R. I—33a-35a.) Therefore the Joint Administrators are not discharged or released from their bonds and are still the Joint Administrators of the Estate of John A. O'Brien, and they still under Kentucky Law must file a final settlement of the estate of John A. O'Brien in the Jefferson County Court.

16. The District Court Granted The Joint Administrators' Motion For Summary Judgments By Its Order And The Summary Judgments Filed And Entered On November 9, 1962, Allowing Them The Amount of $218,472.80. The Court of Appeals Judgment Modified This Amount to $190,-933.40.

The District Court granted the Joint Administrators' Motion for Summary Judgments by his order, and allowed them two hundred eighteen thousand four hundred seventy-two dollars and eighty cents ($218,472.80) in the Summary Judgments filed and entered in the within action on November 9, 1962, and the Court of Appeals upheld his ruling except, that the six (6%) per cent interest on the joint administrators' purported Judgment should be from November 9, 1962, instead of from May 1, 1952.

It appears from the Summary Judgments of the District Court and the Court of Appeals that the Joint Administrators were only awarded $73,756.98 and states that it is subject to a credit thereon of $30,788.86 or the net sum of $42,968.12, with interest thereon at the rate of 6% per annum from March 5, 1952, and modified by the Court of Appeals that interest shall be from November 9, 1962 until paid, and their costs herein expended, but when an analysis of the Judgments is made, it shows that the District Court awarded to the Joint Administrators and their attorneys over $218,472.80, and the Court of Appeals modified the ruling and the total amount now awarded is $190,-933.40.

The Joint Administrators held cash in their possession belonging to Mrs. Smith, in the amount of $25,000.00 from February 11, 1936 to June 28, 1946. The compounded interest at the rate of 6% per annum to which Mrs. Smith is legally entitled on this amount is $20,779.38.

The Joint Administrators held cash in their possession belonging to Mrs. Smith in the amount of $40,000.00 from June 28, 1946, to November 9, 1962. The compounded interest thereon at the rate of 6% per annum which Mrs. Smith is legally entitled amounts to $63,852.57.

The Joint Administrators are still holding in their possession the forty thousand ($40,000.00) dollars cash belonging to Mrs. Smith which when added to the compounded interest makes a total of one hundred twenty four thousand six hundred thirty one dollars and ninety five cents ($124,631.95).

The District Court by his Summary Judgments awarded to the Joint Administrators all of the $40,000.00 cash held by them belonging to Mrs. Smith of which they contend that they now have only $30,788.86 remaining.

The District Court further awarded by his decree, the net sum of $42,968.12 with interest thereon at the rate of 6% per annum from March 5, 1952 until paid, and their costs therein expended.

The interest at the rate of 6% per anuum on $42,968.12 from March 5, 1952, to November 9, 1962, amounts to $27,-539.40, this amount is to be deducted from the above total amount, as modified by the Court of Appeals judgment. The District Court by his Judgments approved the $23,-333.33, *the amount of attorneys fees paid to the law firm of Bruce & Bullitt, which is now the law firm of Bullitt, Dawson & Tarrant, by the Joint Administrators from the cash belonging to Mrs. Smith* on February 11, 1936, for the final settlement of the estate of John A. O'Brien making a total net sum of $218,472.80 awarded to the Joint Administrators on November 9, 1962, the Court of Appeals modified the District Court's ruling only that the joint administrators were not entitled to interest on their alleged over-

payments except from November 9, 1962, until paid deducting this interest of $27,539.40 leaves a balance of $190,933.40 awarded to the joint administrators and their attorneys.

The Judgment of the United States Court of Appeals for the Sixth Circuit and the opinion thereon, filed and entered on April 17, 1964, modified the Judgment of the District Court, only as to interest on $42,968.12, at the rate of six per cent (6%) per annum from March 5, 1952, to November 9, 1962, and ruled that the joint administrators and their attorneys should receive the interest thereon only from November 9, 1962 until paid, and stated in Opinion page 9, Appendix D hereto, R. Vol. III, page 2368a and page 2381a as follows:

> "The judgment therefore will be modified to the extent that it awards interest from March 5, 1952, and so as to provide that the plaintiffs have and recover from defendant, Patricia R. Smith, the sum of $42,968.12, with interest thereon at the rate of six per cent per annum from November 9, 1962, which was the date of the entry of the judgment in this case. In all other respects the judgment of the District Court is affirmed and the case is remanded to the District Court for any further necessary action not inconsistent with this opinion."

We again repeat that this is a case to be decided upon facts, and the statutes and law of Kentucky applicable to the facts of this case which are settled and well established.

Upon an examination of the facts it becomes clear that Mrs. O'Brien-Smith was the sole beneficiary of the last will, and of the Estate of her late husband, John A. O'Brien, as it was held by the Court of Appeals of Kentucky.

At the death of John A. O'Brien, Mrs. O'Brien-Smith inherited through his estate, 23.77% of the entire Edward

J. O'Brien & Company and its four subsidiaries. Further, at the death of John A. O'Brien, the Estate automatically became a partner in the O'Brien partnership. The Joint Administrators did not reveal the true facts to Mrs. O'Brien-Smith, the sole beneficiary, and they misrepresented the law to her upon her legal rights. The partnership agreement between the partners provided that the estate or its representative should remain a partner for five years after the death of one of the partners.

The Joint Administrators, the Plaintiffs herein, have acted in bad faith. Equity requires therefore that they must account to the Estate and Mrs. O'Brien-Smith, the sole beneficiary of the estate, for the full market value of the estate and her 23.77% interest in the partnership of Edward J. O'Brien & Company and its four subsidiaries on November 5-15, 1935, and its 23.77% of the net profits of the O'Brien Company and its four subsidiaries for the years of 1935, 1936, 1937 and to December 31, 1938, without any allowance for Joint Administrators fees, or their attorneys fees. Since not one cent of the fees allowed to them by the District Court and the Court of Appeals was for the benefit of the O'Brien Estate or Mrs. O'Brien-Smith, *if any legitimate claims ever existed for the Joint Administrators, it has been forfeited by wilful waste, mismanagement, and three trumped-up settlement suits* and *numerous appeals prosecuted by the Joint Administrators and their attorneys for twenty-nine (29) years, to keep from signing and filing the receipts and disbursements and a final settlement of the O'Brien Estate in the Jefferson County Court, and to this day it has not been filed.*

The Joint Administrators have violated their statutory duties imposed upon them by the statutes and law of Kentucky in every respect, as fully set out in Mrs. O'Brien-Smith's original answer and counterclaim; (R. I—121a-

139a) her first amended answer and her first amended counterclaim; (R. I—164a-330a), and in her second amended answer and second amended counterclaim. (R. II—1703a-1989a), further, no consideration was given to recoupment by the District Court, or the Court of Appeals.

The proceedings to settle estates in Kentucky was so old that it was new to an out of State District Judge who never did understand probate procedure in Kentucky, thus, causing him to make a grievous error in his ruling concerning the Surcharging of a Settlement of an estate, which had been filed in a County Court, and the many other errors as pointed out and the Court of Appeals upheld his ruling.

The denial by the District Court for leave to amend is contrary both to the letter and spirit of Rule 15, resulting in error highly prejudicial to the cause of Mrs. O'Brien-Smith, by reason of which denial, the judgment should have been reversed.

The record in this case demonstrates the most flagrant violations by the Plaintiffs-Joint Administrators of their duties imposed by the statutory and general laws of the State of Kentucky for governing the administration of the estate entrusted to their care. As a result, Mrs. O'Brien-Smith was defrauded out of a substantial part of the value of her deceased husbands interest in Edward J. O'Brien & Company and its four subsidiaries for which the Joint Administrators under all the rules of law and statutes of Kentucky and the cases heretofore cited, are bound to account. Not only did they defy the mandates of the law and specific rulings directing them to file a final settlement of the O'Brien Estate in the County Court by the Court of Appeals of Kentucky for 14 years, but they breached the duty imposed upon fiduciaries to deal in utmost good faith for the benefit of the trust undertaken by them.

The Louisville Trust Company and Citizens Fidelity Bank & Trust Co., the Joint Administrators, had George Caldwell, a lawyer and Vice-President of the Louisville Trust Co., and James G. McPherson, Vice-President of the Fidelity & Columbia Trust Co., which is now Citizens Fidelity Bank & Trust Co., who was connected with that company for nearly forty years, to write up the offer and contract for the sale of the interest owned by the estate of John A. O'Brien which Mrs. O'Brien-Smith inherited, and for which they sold for less than one-third of its market value, and only accounted to the estate and Mrs. Smith for one year's profits. When in reality the estate and Mrs. Smith's interest had a market value of $1,216,-536.51 and the estate was entitled to remain in the Company for five years and receive the net profits for five years, from and after the death of John A. O'Brien until December 31, 1938, which amounted to $149,480.51. At that date, the deceased partner's estate would be clearly entitled to an accounting of its 23.77% of all assets, under definite instruction from this Court as to procedure. From such market value found to belong to the estate and Mrs. O'Brien-Smith, upon such accounting, must be subtracted the amount already paid to her by the Joint Administrators, viz, two hundred eighty thousand ($280,000.00) dollars. The Estate of John A. O'Brien and Mrs. O'Brien-Smith should then have a decree for the balance due upon such accounting, plus all the amounts due her upon such accounting, and plus all the amounts due her as set out in her First Amended Answer and First Amended Counterclaim, and in her Second Amended Answer and her Second Amended Counterclaim.

This case, like all other equity cases, is governed by the broad maxim that a Court of equity which has obtained

jurisdiction of a controversy will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter. Manifestly, the circumstances are such that this Court cannot easily restore Mrs. O'Brien-Smith to her position in the partnership as it was prior to November 5-15, 1935, when the contract of sale was made, or February 11, 1936, when the bill of sale was signed. Therefore, this Court has power to permit the sale of the partnership interest of John A. O'Brien to stand, but to grant relief based upon the fraud as of that date. In other words, this Court has power to decree an accounting by the Joint Administrators for the market value of such partnership interest as of such date which they fraudulently sold the John A. O'Brien estate's interest in the Edward J. O'Brien Tobacco Company and its four subsidiaries.

This would be a comparatively simple matter, because the record in this case provides the basis for such values as of November, 1935. But this record does not contain such basis of values for December 31, 1938, the end of the five-year period when John A. O'Brien's partnership interest automatically terminated, because *the Court prohibited Mrs. Smith from showing such values as of that date by his refusal to grant her a trial of the issues by a jury in this action.*

An accounting would likewise be a comparatively simple matter. It would cover the items of additional value over and above the figure $425,649.45 which was represented by the Joint Administrators as the market value of John A. O'Brien's interest in the partnership, as fully set out in this Petition on pages 56-57 and 69-70.

There can be no question that under Kentucky law that the formal entry of an order of confirmation of the settlement of an estate, no exceptions having been filed thereto, thus no judicial contest, litigation, or decision on the exceptions, was not a *final judgment* conclusive of the rights of the parties from which appeal could be taken, and which precludes the aggrieved party from bringing her suit to surcharge and correct the alleged errors in the settlement. Under the Kentucky law this can be done within five years.

The Federal District Court and the Court of Appeals decided on an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

The ruling in this case by the District Court and the Court of Appeals is based on a false premise,

> That a final Order and Judgment had been rendered in the County (Probate) Court of Jefferson County, Kentucky, when in truth and fact a County (Probate) Court in Kentucky has no such power, so the Judgments of the District Court, and the Court of Appeals, are based on a nullity as far as a final judgment is concerned in a Kentucky County (Probate) Court. *This so-called final Judgment is only a document to preserve prima facie evidence between the parties concerned.*

Unfortunately for the Petitioner, the Judge in the District Court before whom this case was heard grew up, and became a prosecuting attorney, in a jurisdiction where the Probate Court is among the strongest in the nation. The Probate Courts in Michigan, have final and complete jurisdiction of the res, and complete and final administration of an estate.

In Kentucky there are no Probate Courts. The settlement of estates in Kentucky are controlled by the statutes, and Kentucky law.

None of the members of the Court of Appeals (before whom this case was heard on oral argument) are from the State of Kentucky. One of the Judges is from Tennessee and two are from the State of Michigan, which have probate Courts of final jurisdiction. So, the Court of Appeals was misled by the District Judge, and they do not have any particular knowledge of the so-called probate law of Kentucky.

There are many phases to this case, the line of least resistance was to follow a long opinion of the lower (District) Court. The decision of the District Court was based on a false premise and the lower Court admits in effect that he might have flipped a coin and wrote his opinion accordingly.

We call to this Honorable Court's attention a statement made by the District Court (Judge Kent), on November 9, 1962, in Appendix C hereto, R. Vol. II, p. 2171a, the Court said in speaking of the Judgment of the County Court of March 5, 1952, "If we were right before (meaning in his opinion of March 4, 1961), we are right now. If we were wrong before, we are wrong now."

"In other words, either it is, or it is not a final order (judgment)." This was said by the District Court on November 9, 1962, at his second and last hearing in this action at Louisville, Kentucky. None of the three Federal Judges in the United States Court of Appeals or in the District Court, had an opportunity to become familiar with the substantive law applicable. So, the Court of Appeals and the District Court do not have any particular or special knowledge with the so-called probate law of Kentucky.

R. Lee Blackwell, an attorney for the Trust Companies said on November 9, 1962, at the hearing before the District Court, that "We bottom our motion (in respect to the Trust Companies' Motion For Summary Judgments and

to deny Mrs. Smith the right to file a second amended counterclaim which was tendered for filing on May 15, 1961, by Mrs. Smith) solely upon the proposition that the *county court judgment* and amended judgment *did finally settle* the estate * * *."

Then on October 31, 1963, eleven (11) months and twenty-one (21) days later, the same attorney filed a brief in the Court of Appeals stating that *"the County Court (in Kentucky) cannot enter an in personam judgment upon which an execution may issue for its enforcement."*

Even though the counsel for the two Trust Companies admitted in their brief (filed in this action in the Court of Appeals) that the Jefferson County Court *could not enter an in personam judgment, and he admitted at the oral argument before three of the judges of the Court of Appeals, that the County Court of Kentucky could not enter an in personam judgment, upon which an execution may issue for its enforcement*, yet the Court of Appeals with these two admissions from the Trust Companies' counsel, have ruled that the Judgment of the County Court of March 5, 1952, and amended on May 1, 1952, is a final judgment and that Mrs. Smith's remedy was by appeal to the circuit court.

The Court of Appeals admits that there are two ways under Kentucky law to challenge the final settlement of accounts of an executor or administrator: (1) The party feeling aggrieved by the settlement may file exceptions thereto, and appeal to the State Circuit Court from the action of the County Court; or (2) the aggrieved party may let the settlement be confirmed and approved by the County Court, without written exceptions, and file an action within five years to surcharge and falsify the settlement on ground of error, mistake or fraud, and the Court

of Appeals correctly states the Petitioner's contentions under the cases cited.

The analysis of the Court completely misses the point, because Mrs. Smith was never before the County Court contesting the right of the fiduciary to credits.

In the proceedings in the County Court wherein the joint administrators' fees and their fees for their attorneys were allowed, neither Mrs. Smith or any attorney for her appeared, and Mrs. Smith did not file any pleading or exceptions contesting those fees. In the proceedings which resulted directly in the allowance of those fees, Mrs. Smith did not appear, and she did not file any exceptions at all, and under the Kentucky law and Statutes she had the right to contest those fees and all other invalid items within five years from the date the Judgment and Order was filed in the Jefferson County Court, on March 5, 1952, and amended on May 1, 1952, to wit, by Kentucky law, she had until May 1, 1957, to file a suit to surcharge and falsify the joint administrators' purported final settlement of their accounts of the Estate of John A. O'Brien under the Kentucky law.

The Court of Appeals erroneously construed the Kentucky rule of law, and further upheld the District Court that the petitioner took part in and participated in the settlement of the final account within the meaning of Kentucky law. Mrs. Smith did not participate in the actual settlement proceedings, she did not file any written exceptions to the purported final settlement of accounts of the joint administrators in County Court, so no contest, litigation, or decision was ever had to test the validity of any claim in the settlement from which an appeal could be taken.

We are fully supported in Mrs. Smith's contentions by the following cases:

Scott's Heirs v. Kennedy's Ex'r., etc., 12 B.M. 510-515, 51 Ky. 510-517, 4 KLR 712 (1849);

Stanberry's Adm'r. v. Robinson, etc., 16 KLR 309, 27 S.W. 973;

Bell v. Henshaw, 91 Ky. 430, 15 S.W. 3, 12 Ky. Law Rep. 674;

Dees' Adm'r. v. Dees' Ex'r et al., 249 Ky. 650, 61 S.W. (2d) 301-302 (Court of Appeals of Ky. June 6, 1933);

Turley's Adm'r. v. Barnes, etc., 103 Ky. 127, 44 S.W. 446, 19 Ky. Law Rep. 1808;

Wheedon's Adm'r. v. Barrett's Guardian et al., 253 Ky., pages 737-743;

Brady v. Brannon, 134 Ky. 769, 121 S.W. 679, 680;

Central Trust Co., etc. v. Bennett, 208 Ky. 281, 270 S.W. 821.

There can be no question that under Kentucky law the Petitioner's Motion for leave to file an Amended Answer and an Amended Counterclaim to surcharge and falsify the Joint Administrator's purported final settlement of the accounts of the estate of John A. O'Brien should have been sustained. In holding otherwise, the Court of Appeals decided an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

For the convenience of this Court, some of the Kentucky Statutes, some of the Kentucky law citations, and some of the other citations cited herein, which sustain the Petitioner's contentions, are printed in Appendix A hereto, under a separate cover.

The Court of Appeals erroneously construed the statutes and the provisional law of Kentucky, as cited in its opinion, on final judgments and settlements of estates in Kentucky, and the duties and responsibilities imposed upon administrators by the Statutes and laws of Kentucky.

1. One of the main issues raised and set out in the Plaintiffs Trust Companies' Complaint, (which consisted of 82 printed pages) is the sale made by the Plaintiffs Trust Companies of the twenty eight and thirty three one hundreths (28.33%) per cent partnership interest in the Edward J. O'Brien & Company, (one of the largest independent tobacco brokers in the world), owned by the Defendant Patricia R. Smith, which the Trust Companies sold for less than one third of its market value. The said issue was fully answered and controverted by the Defendant Patricia R. Smith, in her answer and counterclaim filed in the within case on November 12, 1956. On this issue the District Court refused to have a trial, or permit any testimony to be introduced, and the Court of Appeals, upheld the District Court in this ruling.

The decision of the Court of Appeals for the Sixth Circuit in upholding the District Court in taking jurisdiction of a probate matter, which is an action filed by the Joint Administrators of the Estate of John A. O'Brien, the Plaintiffs-Respondents, for the final settlement of their accounts of the Estate of John A. O'Brien, wherein the District Court awarded to the Joint Administrators and their attorneys an additional Seventy Three Thousand Seven Hundred Fifty Six Dollars and Ninety Eight Cents ($73,-756.98) for fees, and approved the payment which had already been made by the Joint Administrators to their attorneys of over Twenty Five Thousand ($25,000.00) Dollars, and in the same ruling held that the District Court did not have jurisdiction of a probate matter, denying the Defendant-Petitioner Patricia R. Smith, the right to have a trial on the issues raised in the Complaint and the Counterclaim, or to file an amended answer and an amended counterclaim to the Plaintiffs-Respondents the Joint Administrators' complaint, in this case, to surcharge and falsify the plaintiffs Joint Administrators' purported final

settlement of their accounts of the Estate of John A. O'Brien in order to determine the validity of their respective claims. This Ruling is unfair; unjust, contrary to the laws, and in violation of the statutes and laws of Kentucky, governing the final settlement of the accounts of an administrator of an estate in Kentucky, and is in conflict with the decisions of the Court of Appeals for the Second Circuit on a similar matter, in the case of *Griffith* v. *Bank of New York, 147 F. 2d 899 (February 16, 1945)*, and the said Ruling is in conflict with the Court of Appeals for the Sixth Circuit, in the case of *Rogers* v. *Girard Trust Company, 150 Fed. 2d 239 (February 7, 1947)*.

The decision and summary judgments of the Court of Appeals for the Sixth Circuit, which affirmed, upheld and modified the judgments of the District Court, *and approved the entire administration of the Estate of John A. O'Brien by these two Trust Companies,* which the District Court granted to the Plaintiffs-Respondents Trust Companies on their Motions for Summary Judgments, *but denying the Defendant-Petitioner Patricia R. Smith, the right of a trial by a jury, on the issues in this case, which were denied and controverted by her in her answer and counterclaim filed in this case, on November 12, 1956,* to the said action which was filed against her by the plaintiffs Trust Companies on September 13, 1956, for the final settlement of their accounts of the Estate of John A. O'Brien, of which the Petitioner Patricia R. Smith is the sole beneficiary, *is a decision of a Federal question,* because it deprived the Defendant-Petitioner Patricia R. Smith, of her property without due process of law, and all of which ruling and conclusions deny the Defendant-Petitioner the equal protection of the laws in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

The said decision of said Court of Appeals in upholding the District Court in taking jurisdiction in the District

Court in an action of a probate matter, in the final settlement of the accounts of an administrator of an estate, and fixing the fees both for the plaintiffs Joint Administrators, and their attorneys, the said fees being based on an unenforcible judgment rendered by a County Commissioner in a County Court, and approved by a County Judge in a County Court in Kentucky, in a "Kangaroo Court" hearing. Years later the plaintiffs Trust Companies admitted to the Court of Appeals, in their brief, and on oral argument, in said Court, that said County (Probate) Court in Kentucky, could not legally enter an *in personam* judgment, upon which an execution may issue for its enforcement, and that the County Judge had no legal right to render a money judgment in a County (Probate) Court in any sum in Kentucky. Therefore, *the defendant Patricia R. Smith* did not, and *could not legally appeal from the said judgment, filed in the County (Probate) Court.* The plaintiffs Trust Companies *never at any time* made an effort to levy an execution. (The effect of the law consists in Execution) to collect said County Court judgment, which was filed and entered on March 5, 1952, in the Jefferson County Court, and amended on May 1, 1952, yet four years, six months, and eight days had passed but no execution was issued) before the within action was filed against the defendant Patricia R. Smith, by the plaintiffs Trust Companies, on September 13, 1956, which is the Trust Companies' third settlement suit filed by them in the O'Brien Estate, which incorporated the said unenforcible judgment in their complaint; had the judgment been good this suit would not have been filed to collect fees. The decision of the Court of Appeals being consistently wrong and in error wherein the Court of Appeals upheld the District Court. Thus denying the defendant *Patricia R. Smith, the right to surcharge and falsify the purported final settlement of the accounts of the said Estate,* filed by the Joint Administra-

tors, *and denied the Defendant-Petitioner Patricia R. Smith the right of a trial on the issues of this case,* said ruling was in violation of the Kentucky Revised Statutes and laws of Kentucky governing the final settlement of the accounts of an administrator of an estate in Kentucky, *which was and is an important state question, which is in conflict with the applicable statutes and laws of the State of Kentucky,* as we have clearly shown in this Petition.

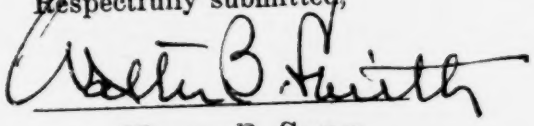
4. The said decision of said Court of Appeals in upholding the District Court as to the right of the plaintiffs Trust Companies the Joint Administrators of the Estate of John A. O'Brien, to file an amended reply to the defendant Patricia R. Smith's original counterclaim, *three years after the counterclaim was filed, said amended reply of the Trust Companies consisting of one hundred fifty nine printed pages, including six Exhibits, but denying the defendant, Patricia R. Smith, the right to file any amendments to her original answer or her original counterclaim,* filed in this case, is in violation of Rule 15, of the Federal Rules of Civil Procedure, such rulings have so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The right to be heard is one of the fundamental rights of due process. The Court of Appeals sustained a denial of the due process guaranteed by the Fourteenth Amendment to the Federal Constitution. The failure of the District Court and the Court of Appeals to grant this petitioner a trial on the issues in this action, and the right to file an amended answer and an amended counterclaim to surcharge and falsify the joint administrators purported final settlement of their accounts of the estate of John A. O'Brien or to remand this action to Jefferson Circuit Court, constituted an abuse of discretion so marked as to warrant the exercise by this court of its power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of Certiorari should be granted.

Respectfully submitted,



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January 15, 1965

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY (formerly Fidelity and Columbia Trust Company), Joint Administrators with the Will Annexed of the ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX A.

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January 15, 1965

APPENDIX A

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX A.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL RULES OF CIVIL PROCEDURE
Rule 15.
AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Supreme Court Constructions

City of Texarkana, Tex., v. Arkansas, Louisiana Gas Co., 59 S.Ct. 448, 306 U.S. 188, 620, 83 L.Ed. 598.

Tiller v. Atlantic Coast Line R. Co., 65 S.Ct. 421, 323 U.S. 574, 89 L.Ed. 465.

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Kentucky Revised Statutes Which Control The Final Settlements Of Accounts With Fiduciaries And Administrators Or Executors In Kentucky, Are Quoted Herewith From The Revised Statutes Of Kentucky.

1. *The Statute KRS 25.170 (1062; 1065) Provides:* "Settlements with fiduciaries; special commissioner; evidence.—The county judge shall make settlements with personal representatives, trustees, assignees, committees, curators and guardians in his county; or may, if he thinks proper, appoint a special commissioner to make such settlements; evidence may be heard for or against any item, and all oral evidence shall be reduced to writing by him, and no evidence shall be presumed to have been heard except such as is reduced to writing and reported. (1893, c. 221, p. 1030, Section 42.)

Section 1065. Biennial settlements with fiduciaries; notice; penalty.—He shall, when called on by a fiduciary,

settle his accounts, and shall once in each two years require all fiduciaries to settle their accounts, unless there is an action pending in the circuit court for such settlements; and any fiduciary failing without good cause therefor, when so notified to settle his accounts, shall be fined by the judge, for each day he so fails or refuses after notice, ten dollars, to be collected by rule or other process; notice of the time and place of settlement shall be given by the judge to all residents of the county interested in the settlement. (1893, c. 221, p. 1030, Section 45.)

This Statute was revised June 1, 1942, and reads as follows: Settlement with fiduciaries; special commissioner.—The county judge shall make settlements with personal representatives, trustees, assignees, committees, curators and guardians in his county, or appoint a special commissioner to make such settlements. (1942, c. 167, Sec. 24. Eff. June 1, 1942.)

2. *The Statute KS 3858 now KRS 25.175, in 1936 provided that: Section 3858.* Settlements, when to be made; duty of clerk.—Every personal representative shall have his accounts settled, and the settlements and vouchers sustaining the same returned to the county court within two years after he qualifies, and as often thereafter as the court may require, which settlement, when approved by the court, shall be recorded and indexed by the clerk, and the original and the vouchers carefully kept by him in his office. (1893, c. 156, p. 539, Sec. 22.)

In 1944, this Statute was revised and now states as follows: Fiduciaries' accounts; when required; proof of balances and securities.—One year after appointment and annually thereafter, unless otherwise provided by law, every fiduciary must render an account of the execution of his trust to the court by which he was appointed, including in such account an itemized statement of receipts and

disbursements supported by vouchers accompanying the same and a statement of all investments on hand and changes in investments since the filing of his last account. Provided, however, that guardians, committees and trustees under continuing trust, after their first accounting, shall render their accounts thereafter biennially, or at shorter intervals if the court shall require it. Such settlements, when approved and confirmed by the court, shall be recorded and indexed by the clerk, and the original and the vouchers carefully kept by him in his office. An account shall be rendered by the fiduciary at any other time upon order of the court upon its own motion or that of any person interested in the trust, for good cause shown on affidavit. At the expiration of his trust such fiduciary must fully account for and pay over the trust estate to the person or persons entitled thereto. Every such account shall list all unpaid creditors whose claims have been allowed and all creditors whose claims have been disallowed. No account of a fiduciary except of corporate fiduciaries under the supervision of State or Federal banking authorities shall be approved until there are exhibited to the court, for its examination, the security or securities shown in said account as being in the hands of the fiduciary, or the certificate of a bank having possession thereof or in which they have been deposited for safe-keeping, and a certified bank statement showing the funds to the credit of the trust. (1944, c. 173, Sec. 4. Eff. June 13, 1944. 1942, c. 167.)

3. *The Statute KS 1066; 1067 now KRS 25.190, provides: Sec. 1066.* "Settlement to be reported in writing; vouchers.—A report in writing of the settlement, showing each item of debit and credit, and the general result, shall be made by the judge or his commissioner, and returned, together with all evidence heard and vouchers filed, to the county court at its next regular term, and noted of record." (1893, c. 221, p. 1030, Sec. 46.)

Sec. 1067. "Settlements filed by clerk; exceptions; vouchers; new evidence.—The clerk shall endorse on the report the time of filing the same, and it shall lay over one term for exceptions, to be filed by any person interested. If no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded. If exceptions are taken, other evidence besides that reported may be heard, and the court shall, upon the whole case, reject, confirm, alter or amend the report, and if confirmed, order it to be recorded. The vouchers accompanying the report shall not be recorded, but must be carefully kept on file with the report in the clerk's office. Any new evidence given in court must be reduced to writing and filed with the report. Settlements so made and recorded shall be prima facie evidence between the parties interested." (1893, c. 221, p. 1030, Sec. 47.)

The Statute KRS 25.190 (1066; 1067) Provides: Report and filing of settlement.—The county judge or his commissioner shall make a written report of the settlement, showing each item of debit and credit, and the general result, and return it, with all evidence heard and vouchers filed, to the county court at its next regular term. The clerk shall note it of record, and endorse on it the time of filing.

4. *The Statute KS 1067 now KRS 25.200, provides:* "Settlements filed by clerk; exceptions; vouchers; new evidence.—The clerk shall endorse on the report the time of filing the same, and it shall lay over one term for exceptions, to be filed by any person interested. If no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded. If exceptions are taken, other evidence besides that reported may be heard, and the court shall, upon the whole case, reject, confirm, alter or amend the report, and if confirmed, order it to be recorded. The vouchers accompanying the report shall not

be recorded, but must be carefully kept on file with the report in the clerk's office. Any new evidence given in court must be reduced to writing and filed with the report. Settlements so made and recorded shall be prima facie evidence between the parties interested." (1893, c. 221, p. 1030, Sec. 47.)

This Statute 25.200 (1067) was revised June 1, 1942, and reads as follows: "Settlements filed by clerk; exceptions; vouchers, new evidence.—The clerk shall endorse on the report the time of filing the same and it shall lay over not less than ten days until the first day of the next term of court, to be known as the date of hearing, during which or at which, exceptions may be filed by any person interested. If no exceptions are filed the report, if made according to law, shall be approved and recorded. If exceptions are filed, other evidence besides that reported may be heard, and the court shall, upon the whole case, reject, confirm, alter or amend the report, and if confirmed, order it to be recorded. The vouchers accompanying the report shall not be recorded, but must be carefully kept on file with the report in the clerk's office. Any new evidence given in court must be reduced to writing and filed with the report. Settlements so made and recorded shall be prima facie evidence between the parties interested." (1942, c. 167, Sec. 13, Eff. June 1, 1942.)

5. *The Statute KS 403 now KRS 28.200 provides:* "Settlements with fiduciaries may be recorded; fees of clerks.—When the court may so direct, settlements of the accounts of personal representatives, trustees, guardians, or other fiduciaries, made before and reported by any commissioner, and all reports of estates or funds received or disbursed, under order of the court, by its commissioner or receiver, after the same shall have been confirmed by the court, shall be recorded by the clerk of such court in a book to be pro-

vided for that purpose. The vouchers accompanying such settlements or reports shall not be recorded. The clerk of such court shall be entitled to the same fees allowed by law to the clerks of the county courts for similar services. The commissioner or receiver of the court making such settlement or report shall allow, and state on the face thereof, the amount of fees that will be due to the clerk for recording." (1892, c. 31, p. 47, Sec. 15.)

This Statute 28.200 (403) was revised to read as follows: "Settlements with fiduciaries, recording of; clerk's fees.—When the court directs, settlements of the accounts of fiduciaries made before and reported by any commissioner, and all reports of estates or funds received or disbursed, under order of the court, by its commissioner or receiver, after they have been confirmed by the court, shall be recorded by the clerk of the court in a book to be provided for that purpose. The vouchers accompanying the settlements or reports shall not be recorded. The clerk shall be entitled to the same fees allowed to county clerks for similar services. The commissioner or receiver making the settlement or report shall allow, and state on the face thereof, the amount of fees that will be due to the clerk for recording."

6. *The Statute KS 186d-1; 3751 now KRS 62.060 provides:* **"BOND TO BE FOR FIXED SUM; MAY BE INCREASED; RELIEF FROM CERTAIN LIABILITIES.**—That the bond required by law to be executed and given by any state, county, city, school, or other public official, and the bond required by law of and depository of state, county, city, school or other public funds, and the bond of any executor, administrator, guardian, committee, assignee, or other fiduciary, and any other bond required by law for the discharge or performance of any public or fiducial office, trust, or employment, shall be a covenant to

the Commonwealth of Kentucky, from the principal and surety or sureties, that the principal will faithfully discharge the duties of the office, trust, or employment, and there shall be no other obligation in such bond; and such bonds shall be limited in a definite penal sum, which shall be determined and fixed by the officer or officers whose duty it is to approve the bond, and the recovery against the surety under any such bond shall be limited to the amount of the penalty named therein: Provided, that the bond of any executor, administrator, guardian, committee, assignee, or other fiduciary, shall be fixed in a penal sum of not less than the estimated value of the estate, and, provided, further, that the officer or officers taking any bond mentioned in this act, may at any time when it may appear to be to the interest of the obligee or obligees, increase the penal sum of such bond or require a renewal thereof with other or additional sureties, and, provided, further, that all state, county, city, school and other public officials and executors, administrators, guardians, committees, assignees and other fiduciaries, and other persons required by law to give bonds for the discharge or performance of any public or fiducial office, trust, or employment are hereby expressly relieved from all liability as insurers of funds which come into their hands, or subject to their control after same shall have been deposited in good faith in a bank or banks, a depository or depositories in the county approved by the fiscal court and 'the duties of the office, trust, or employment' shall not include any responsibility for loss of, or delay in payment of, funds deposited in any bank by reason of the failure or suspension of such bank or other depository and the obligors in such bonds are hereby expressly relieved of such responsibility, having complied with this statute." (1934, c. 22; 1910, c. 87, p. 263; 1908, c. 49, p. 125, Sec. 1. Eff. March 13, 1934.)

SEC. 3751. "COVENANT OF OFFICERS; CONDITIONS OF.—The obligation required by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the Commonwealth of Kentucky from the person and his sureties that the principal shall faithfully discharge the duties of the office, trust or employment, but a bond or obligation taken in any other form shall be binding on the parties thereto according to its terms." (1893, c. 202, p. 912, Sec. 12.)

KRS 62.060 (186d-1; 3751) was revised in June 19, 1946, and reads as follows: **BONDS OF OFFICERS, DEPOSITORIES AND FIDUCIARIES; FORM; CONDITIONS; AMOUNT; RENEWAL.**—(1) The bond required by law to be executed and given by any public official, depository of public funds, or any fiduciary, and other bond required by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the Commonwealth of Kentucky from the principal and surety or sureties that the principal will faithfully discharge his duties, and there shall be no other obligation in the bond. The bond shall be limited in a definite penal sum, which shall be determined and fixed by the officer or officers whose duty it is to approve the bond. The bond of each fiduciary shall be fixed in a penal sum of not less than the estimated value of the estate which the fiduciary is in charge of. The officer or officers taking any bond mentioned in this section may, at any time when it appears to be to the interest of the obligee, increase the penal sum of the bond or require a renewal thereof with other or additional sureties." (1946, c. 27, Sec. 6. Eff. 6-19-46.)

(2) "A bond or obligation taken in any form other than that required by subsection (1) shall be binding on the parties thereto according to its terms." (1946, c. 27, Sec. 6. Eff. 6-19-46.)

(3) "This section shall not apply to bonds given pursuant to KRS 62.160 to 62.200." (1946, c. 27, Sec. 6. Eff. June 19, 1946.)

7. *The Statute KRS 62.070 (186-1; 3752) provides:* "**ACTION AND RECOVERY ON BOND.**—Action may be brought from time to time on any bond required by law for the discharge or performance of any public or fiducial office, trust or employment, in the name of the Commonwealth, for its benefit or for that of any person injured by a breach of the covenant or condition, at the proper costs of the party suing, against the parties jointly or severally, together with the personal representatives, heirs and devisees or distributees of such of them as may be dead. Recovery against the surety shall be limited to the amount of the penalty fixed in the bond, but recovery against the principal shall not be limited by the amount of the penalty fixed in the bond. Recovery on the bond shall not be restricted to duties or responsibilities belonging to the office, trust or employment at the date the bond is executed, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed."

8. *The Statute KRS 287.220 (598b-4; 611) provides:* "**CORPORATE FIDUCIARIES SUBJECT TO LAWS GOVERNING INDIVIDUALS.**—(1) When acting as a fiduciary or in any other capacity in which the duties, powers, liabilities, rights and compensation are regulated by law, or under the control or supervision of the court, banks and trust companies shall, except as provided in subsection (2), be subject to the same duties and responsibilities, have the same rights and powers, and receive the same compensation as is allowed the individual holding or exercising similar offices or trusts."

(2) "Upon all bonds required to be executed by such corporation before any court, the capital stock shall be the

only security required for the faithful performance of its duties, unless the court or officer before whom the bond is executed, or some party in interest demands additional security."

9. *The Statute KRS 395.255 provides:* **"NOTICE TO COMPEL FILING OF INVENTORY OR ACCOUNT; REMOVAL FOR DELINQUENCY; DISALLOWANCE OF COMPENSATION.—**
If a fiduciary neglects or refuses to file an inventory or account when due according to law, or when ordered by the court, the court shall notify the fiduciary of his delinquency and fix a date when such inventory or account must be filed. Unless there is pending in the circuit court a suit to settle the estate such neglect or refusal shall be grounds for removal by the court. If the fiduciary fails to file such account within thirty days after the date fixed in said notice, no allowance shall be made for his services unless the court enters upon its minutes an order that such delay was justified." (1942, c. 167 Sec. 12. Eff. June 1, 1942.)

10. *The Statute KRS 395.310 (3859) provides:* **"INTEREST CHARGED REPRESENTATIVE ON ASSETS.—**
A personal representative, after the expiration of two years from the time he qualifies, shall be charged with interest on the surplus assets in his hands from that period, and before the expiration of two years shall be charged with all interest realized on assets."

11. *The Statute KRS 396.140 (3877) provides:* **"OVERPAYMENT; RECOVERY OF.—**
When a personal representative pays to a creditor an undue proportion of his demand or to a distributee or devisee a part or all of his share of legacy, under a mistake as to the solvency of the estate or otherwise, he may recover

from the creditor, distributee or devisee the amount of the overpayment, with interest."

12. *The Statute KRS 413.090 (2514) provides:* **"ACTION UPON JUDGMENT, WRITTEN CONTRACT OR BOND; FIFTEEN YEAR LIMITATION.—** Except as provided in *KRS 413.110, 413.200, 413.210, 413.220, 413.230 and 413.240*, the following actions shall be commenced within fifteen years after the cause of action first accrued:

(1) An action upon a judgment or decree of any court of this state or of the United States, or of any state or territory thereof, the period to be computed from the date of the last execution thereon.

(2) An action upon a recognizance, bond or written contract.

(3) An action upon the official bond of a sheriff, marshal, clerk, constable or any other public officer, or any commissioner, receiver, curator, personal representative, guardian, committee, or trustee appointed by a court or authority of law.

(4) An action upon an appeal bond or bond given on a supersedeas, attachment, injunction, order of arrest or for the delivery of property or for the forthcoming of property, or to obey or perform an order or judgment of court in an action, or upon a bond for costs, or any other bond taken by a court or judge or by an officer pursuant to the directions of a court or judge, in an action or after judgment or decree, or upon a replevin, sale or delivery bond taken under execution, decree or warrant of distress, upon an indemnifying bond taken under a statute, or upon a bond to suspend a proceeding, or upon a bond or obligation for the payment of money or property or for the performance of any undertaking."

13. *The Statute KRS 413.120 (2515; 2518) provides:* **"ACTIONS TO BE BROUGHT WITHIN FIVE YEARS.—** The following actions shall be commenced within five years after the cause of action accrued:

(1) An action upon a contract not in writing, express or implied.

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

(3) An action for a penalty or forfeiture when no time is fixed by the statute prescribing it.

(4) An action for trespass on real or personal property.

(5) An action for the profits of or damages for withholding real or personal property.

(6) An action for the taking, detaining or injuring personal property, including an action for specific recovery.

(7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.

(8) An action upon a bill of exchange, check, draft or order, or any endorsement thereof, or upon a promissory note, placed upon the footing of a bill of exchange.

(9) An action to enforce the liability of a steamboat or other vessel.

(10) An action upon a merchants' account for goods sold and delivered, or any article charged in such store account.

(11) An action upon an account concerning the trade of merchandise, between merchant and merchant or their agents.

(12) An action for relief or damages on the ground of fraud or mistake.

(13) An action to enforce the liability of bail."

14. *The Statute KRS 426.035 (C. C. 401) provides:*

"EXECUTION MAY ISSUE UNTIL BARRED BY LIMITATION.—
An execution may be issued upon a judgment at any time until the collection of it is barred by the statute of limitation, although no execution may have been previously issued within a year and a day." (1952, c. 84, Sec. 1. Eff. 7-1-53.)

15. *The Statute KRS 451.210 (992) provides:* **"RECORD OF FIDUCIARIES' SETTLEMENTS; FEES.—**
The circuit clerk shall record in proper books the statements of all settlements made by fiduciaries in the court, and shall receive the same fees that county clerks receive for similar services, to be paid by the fiduciary and charged to the estate."

SMITH v. LOUISVILLE TRUST CO. Ky. 987

Cited as 212 S.W. 2d 987

SMITH v. LOUISVILLE TRUST CO.
(CITIZENS FIDELITY BANK & TRUST COMPANY)

Court of Appeals of Kentucky.
June 8, 1948.
Rehearing Denied Oct. 29, 1948.

Executors and administrators

Administrators' petition, not stating amounts of decedent's debts and nature or value of his property nor averring that personal estate was insufficient to pay all debts, alleging that there were sufficient assets to pay unpaid bequests in decedent's will, and not alleging that any one questioned beneficiaries' rights to such bequests, was insufficient to state cause of action for settlement of decedent's estate. Civil Code Prac. §§ 428, 429.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division; W. Scott Miller, Judge.

Action by the Louisville Trust Company and another (Citizens Fidelity Bank & Trust Co.), coadministrators with the will annexed of the estate of John A. O'Brien, de-

ceased, against Patricia R. Smith and others for settlement of the estate. Judgment for plaintiffs, and named defendant appeals.

Reversed.

Frank S. Ginocchio, of Lexington, Lawrence S. Grauman, of Louisville, and Walter B. Smith, of Shelbyville, for appellant.

Allen, McElwain, Dinning, Clarke & Ballantine and Davis, Boehl, Viser & Marcus, all of Louisville, for appellees.

VAN SANT, Commissioner.

The action was instituted by Louisville Trust Company and Citizens Fidelity Bank & Trust Company (formerly Fidelity & Columbia Trust Company), co-administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, against Patricia R. O'Brien (now Smith), and two beneficiaries of specific bequests who are not parties to this appeal because their bequests have been paid in full. The action was for a settlement of the estate of John A. O'Brien, and was instituted under purported authority of Section 428 of the Civil Code of Practice, which provides:

"1. Who may institute action. A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate [provided that no such suit shall be brought by any of the parties named except the personal representative until the expiration of six months after the qualification of such representative].

"2. Who must be made parties. The representatives of the decedent, and all persons having a lien upon or an interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."

In addition to averments in respect to corporate and representative authorities of the plaintiffs, and the corporate capacity of one of the beneficiaries of the will, the petition avers merely:

"Plaintiffs say that the defendant, College of Arts and Sciences of Georgetown University, of Washington, D. C., is a corporation organized and existing under the laws of the District of Columbia, with power to sue and be sued, contract and be contracted with, and with power to own and operate a university for the education of young men, and that said College of Arts and Sciences of Georgetown University, of Washington, D. C., was by Clause 2 of the will of the said John A. O'Brien bequeathed the sum of $1,000.00 in cash, to be expended by the Dean of said College for any purposes for which he may think suitable.

"Plaintiffs state that the defendant, The Most Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louisville, is the bishop of the Roman Catholic Church for the diocese of Louisville, and that the said John A. O'Brien at the time of his death was living in the diocese of Louisville of the Catholic Church, and by Item 2 of his will gave to said defendant the sum of $5,000.00, which should be expended for any purposes that said defendant may think is proper or desirable.

"Plaintiffs say that after their qualification as administrators, with the will annexed, of the said John A. O'Brien, they entered upon the performance of their duties as such, and took possession of all of the personal estate of the said

John A. O'Brien, deceased, and have continued to act as such administrators with the will annexed ever since; that they have caused all estate and inheritance taxes, except certain disputed and undetermined portions thereof, and all debts of said estate, to be paid, and have collected all income arising therefrom, and have kept an account of their receipts and disbursements and are now ready to make final settlement of the said estate; that they have not paid the bequests to either the College of Arts and Sciences of Georgetown University of Washington, or to the Roman Catholic Bishop of the Diocese of Louisville, but that there are sufficient assets to pay both of said bequests."

The prayer of the petition reads as follows:

"Wherefore, the premises considered, plaintiffs pray that their accounts as administrators, with the will annexed, of the estate of the said John A. O'Brien, be referred to the Commissioner of this Court for settlement, and for de-

termination of the amount to be paid to the beneficiaries under the will of John A. O'Brien, as hereinabove set forth; that an order be entered fixing and determining the compensation to be allowed the plaintiffs for their services as administrators with the will annexed of said estate, and that an order be entered fixing the compensation of their attorneys herein for their services in settling said estate, and that said estate be finally settled and distributed by order of this Court; for their costs herein and for all proper and equitable relief."

The principal asset of the estate of John A. O'Brien was a substantial interest in the partnership of E. J. O'Brien and Company, which was engaged in the business of

brokering and wholesaling loose-leaf tobacco. The partnership referred to did not terminate upon the death of either of the partners; and pursuant to the terms of the Articles of Partnership, the estate of John A. O'Brien was to continue as a partner until sold, or until the termination of the partnership should be made by agreed dissolution or incorporation. Approximately two years prior to the institution of this action, Mrs. Smith sold her interest in the partnership to the other members thereof, receiving for her share the sum of $380,000. Approximately eighteen months thereafter this suit was instituted by the Administrators; but previous thereto Mrs. Smith (then O'Brien) instituted a separate suit in the Jefferson Circuit Court against the partners of E. J. O'Brien and Company for the purpose of rescinding the sale of her interest in the partnership. After a hearing in the rescission suit, the lower Court dismissed her petition, which decision was affirmed by this Court, and certiorari denied by the Supreme Court of the United States. O'Brien v. O'Brien et al., 294 Ky. 793, 172 S.W.2d 595; Id., 321 U.S. 767, 64 S.Ct. 518, 88 L.Ed. 1063.

In the instant case Mrs. Smith filed a special and a general demurrer to the petition. The special demurrer was based on the allegation that the Court had no jurisdiction of the subject matter of the action. The general demurrer was based on the allegation that the petition does not state facts sufficient to constitute a cause of action against the defendant (appellant), or for the settlement of the estate of John A. O'Brien, deceased.

In referring to Section 428 of the Civil Code of Practice, supra, Section 429 of the Code provides:

"In such an action the petition must state the amount of the debts and the nature and value of the property, real and personal, of the decedent, so far as known to the plain-

tiff; and, if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts."

It will be noted that the petition in this case does not follow the requirements of Section 429, supra, in that it does not state the amount of the debts, if any, the nature or value of the property, real or personal, of the decedent; neither does it aver that the personal estate is insufficient for the payment of all or any debts. The petition states that, by the terms of the will, certain bequests were made to the College of Arts and Sciences of Georgetown University of Washington, D. C., and to the Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louisville, which at the time of the institution of the action were unpaid; but the petition further alleges that there were at that time sufficient assets to pay both of the bequests; and no allegation was made in the petition that any one questioned the right of either of the beneficiaries to receive the bequests. The petition further alleged that the plaintiffs had caused all estate and inheritance taxes, "except certain disputed and undetermined portions thereof," and all debts of the estate to be paid, and that they had collected all income arising therefrom, and had kept an account of all receipts and disbursements, and that the plaintiffs at the time of the filing of the petition were ready to make final settlement of the estate.

It is obvious that the allegations of the petition fall

short of the requirements of an action to give a circuit court jurisdiction of a case for the settlement of an estate. It is equally obvious from the averments of the petition

that the estate had been settled, except the payment of the specific bequests to the College of Arts and Sciences of Georgetown University and the Bishop of the Roman Catholic Diocese of Louisville; and since no contention was made in respect to the payment of these bequests, the Administrators had only to file their settlement with the Judge of the Jefferson County Court. It is apparent that the Jefferson Circuit Court should have sustained the general demurrer to the petition, because it did not state a cause of action for the settlement of an estate.

The judgment is reversed.

SMITH v. LOUISVILLE TRUST CO. ET AL. (CITIZENS FIDELITY BANK & TRUST CO.)

June 8, 1948.

Rehearing denied October 29, 1948.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

W. Scott Miller, Judge.

Executors and Administrators.—Administrators' petition, not stating amount of decedent's debts and nature or value of his property nor averring that personal estate was insufficient to pay all debts, alleging that there were sufficient assets to pay unpaid bequests in decedent's will, and not alleging that any one questioned beneficiaries' rights to such bequests, was insufficient to state cause of action for settlement of decedent's estate. Civil Code of Practice, secs. 428, 429.

Frank S. Ginocchio, Lawrence S. Grauman and Walter B. Smith for appellant.

Allen, McElwain, Dinning, Clarke & Ballantine and Davis, Boehl, Viser & Marcus for appellees.

OPINION OF THE COURT BY VAN SANT, COMMISSIONER—Reversing.

The action was instituted by Louisville Trust Company and Citizens Fidelity Bank & Trust Company (formerly Fidelity & Columbia Trust Company), co-administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, against Patricia R. O'Brien (now Smith), and two beneficiaries of specific bequests who are not parties to this appeal because their bequests have been paid in full. The action was for a settlement of the estate of John A. O'Brien, and was instituted under purported authority of Section 428 of the Civil Code of Practice, which provides:

"1. Who may institute action. A representative, legatee, distributee or creditor of a deceased person may bring an action in equity for the settlement of his estate (provided that no such suit shall be brought by any of the parties named except the personal representative until the expiration of six months after the qualification of such representative.)

"2. Who must be made parties. The representatives of the decendent, and all persons having a lien upon or an interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."

In addition to averments in respect to corporate and representative authorities of the plaintiffs, and the corporate capacity of one of the beneficiaries of the will, the petition avers merely:

"Plaintiffs say that the defendant, College of Arts and Sciences of Georgetown University, of Washington, D. C., is a corporation organized and existing under the laws of

the District of Columbia, with power to sue and be sued, contract and be contracted with, and with power to own and operate a university for the education of young men, and that said College of Arts and Sciences of Georgetown University, of Washington, D. C., was by Clause 2 of the will of the said John A. O'Brien bequeathed the sum of $1,000.00 in cash, to be expended by the Dean of said College for any purposes for which he may think suitable.

"Plaintiffs state that the defendant, The Most Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louisville, is the bishop of the Roman Catholic Church for the diocese of Louisville, and that the said John A. O'Brien at the time of his death was living in the diocese of Louisville of the Catholic Church, and by Item 2 of his will gave to said defendant the sum of $5,000.00, which should be expended for any purposes that said defendant may think is proper or desirable.

"Plaintiffs say that after their qualification as administrators, with the will annexed, of the said John A. O'Brien, they entered upon the performance of their duties as such, and took possession of all of the personal estate of the said John A. O'Brien, deceased, and have continued to act as such administrators with the will annexed ever since; that they have caused all estate and inheritance taxes, except certain disputed and undetermined portions thereof, and all debts of said estate, to be paid, and have collected all income arising therefrom, and have kept an account of their receipts and disbursements and are now ready to make final settlement of the said estate; that they have not paid the bequests to either the College of Arts and Sciences of Georgetown University of Washington, or to the Roman Catholic Bishop of the Diocese of Louisville, but that there are sufficient assets to pay both of said bequests."

The prayer of the petition reads as follows:

"Wherefore, the premises considered, plaintiffs pray that their accounts as administrators, with the will annexed, of the estate of the said John A. O'Brien, be referred to the Commissioner of this Court for settlement, and for determination of the amount to be paid to the beneficiaries under the will of John A. O'Brien, as hereinabove set forth; that an order be entered fixing and determining the compensation to be allowed the plaintiffs for their services as administrators with the will annexed of said estate, and that an order be entered fixing and determining the comattorneys herein for their services in settling said estate, and that said estate be finally settled and distributed by order of this Court; for their costs herein and for all proper and equitable relief."

The principal asset of the estate of John A. O'Brien

was a substantial interest in the partnership of E. J. O'Brien and Company, which was engaged in the business of brokering and wholesaling loose-leaf tobacco. The partnership referred to did not terminate upon the death of either of the partners; and pursuant to the terms of the Articles of Partnership, the estate of John A. O'Brien was to continue as a partner until sold, or until the termination of the partnership should be made by agreed dissolution or incorporation. Approximately two years prior to the institution of this action, Mrs. Smith sold her interest in the partnership to the other members thereof, receiving for her share the sum of $380,000. Approximately eighteen months thereafter this suit was instituted by the Administrators; but previous thereto Mrs. Smith (then O'Brien) instituted a separate suit in the Jefferson Circuit Court against the partners of E. J. O'Brien and Company for the purpose of rescinding the sale of her interest in the partnership. After a hearing in the rescission suit, the lower Court

dismissed her petition, which decision was affirmed by this Court, and certiorari denied by the Supreme Court of the United States. O'Brien v. O'Brien et al., 294 Ky. 793, 172 S. W. 2d 595; Id., 321 U. S. 767, 64 S. Ct. 518, 88 L. Ed. 1063.

In the instant case Mrs. Smith filed a special and a general demurrer to the petition. The special demurrer was based on the allegation that the Court had no jurisdiction of the subject matter of the action. The general demurrer was based on the allegation that the petition does not state facts sufficient to constitute a cause of action against the defendant (appellant), or for the settlement of the estate of John A. O'Brien, deceased.

In referring to Section 428 of the Civil Code of Practice, supra, Section 429 of the Code provides:

"In such an action the petition must state the amount of the debts and the nature and value of the property, real and personal, of the decedent, so far as known to the plaintiff; and, if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real property descended or devised to the heirs or devisees who may be parties to the action, or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts."

It will be noted that the petition in this case does

not follow the requirements of Section 429, supra, in that it does not state the amount of the debts, if any, the nature or value of the property, real or personal, of the decedent; neither does it aver that the personal estate is insufficient for the payment of all or any debts. The petition states that, by the terms of the will, certain bequests were made to the College of Arts and Sciences of Georgetown University of Washington, D. C., and to the Reverend John A. Floersh, Bishop of the Roman Catholic Diocese of Louis-

ville, which at the time of the institution of the action were unpaid; but the petition further alleges that there were at that time sufficient assets to pay both of the bequests; and no allegation was made in the petition that any one questioned the right of either of the beneficiaries to receive the bequests. The petition further alleged that the plaintiffs had caused all estate and inheritance taxes, "except certain disputed and undetermined portions thereof," and all debts of the estate to be paid, and that they had collected all income arising therefrom, and had kept an account of all receipts and disbursements, and that the plaintiffs at the time of the filing of the petition were ready to make final settlement of the estate.

It is obvious that the allegations of the petition fall short of the requirements of an action to give a circuit court jurisdiction of a case for the settlement of an estate. It is equally obvious from the averments of the petition that the estate had been settled, except the payment of the specific bequests to the College of Arts and Sciences of Georgetown University and the Bishop of the Roman Catholic Diocese of Louisville; and since no contention was made in respect to the payment of these bequests, the Administrators had only to file their settlement with the Judge of the Jefferson County Court. It is apparent that the Jefferson Circuit Court should have sustained the general demurrer to the petition, because it did not state a cause of action for the settlement of an estate.

The judgment is reversed.

LOUISVILLE TRUST CO. ET AL. (CITIZENS FIDELITY BANK & TRUST COMPANY) v. SMITH.

May 16, 1950.

Scott Miller, Judge

Action by Louisville Trust Company and another (Citizens Fidelity Bank & Trust Company), coadministrators, with will annexed of the estate of John A. O'Brien, deceased, against Patricia R. (O'Brien) Smith and others, for settlement of the estate. The Circuit Court, Chancery Branch, Second Division, Jefferson County, Scott Miller, J., rendered judgment for defendants, and plaintiffs appealed. The Court of Appeals, Morris, C., held that petition was insufficient.

Affirmed.

1. Pleading.—The legal sufficiency of a pleading may be tested by an objection to the filing thereof; the objection being treated as a general demurrer thereto.

2. Executors and Administrators.—Amended petition which did not contain averments required by statute though stating that administrators tendered to interested parties a proposed settlement of the estate which they intended to make, and objections were registered was insufficient to state cause of action for settlement of decedent's estate. Civil Code of Practice, sec. 429.

3. Executors and Administrators.—One of the purposes of settlement of estate in county court is to give parties interested opportunity to file objections reasonably and properly.

Allen, McElwain, Dinning, Clark & Ballantine and Davis, Boehl, Viser & Marcus for appellants.

Walter B. Smith for appellee.

Morris, Commissioner—Affirming.

In Smith v. Louisville Trust Co. et al., 308 Ky. 189, 213 S. W. 2d 987, we held that the original petition did not state a cause of action for the settlement of the estate involved, in that it did not contain the averments prescribed in Section 429 of the Civil Code of Practice.

Upon return of the case to the Circuit Court, appellants filed motion for permission to file an amended petition. Objection was entered thereto and the court denied the motion, but permitted the tendered petition to be made a part of the record.

Appellants argue that the chancellor interpreted the mandate and opinion of the court in this second appeal, as precluding any further pleadings in the action, and that the question, as to whether the allegations of the amended petition were sufficient to state a cause of action, was never reached.

We deem it unnecessary to go into the niceties of the difference between the overruling of a motion to file an amended petition, to which there is objection, and the sustaining of a demurrer to that petition after filed, because here this tendered amended petition did not state a cause of action. The result is the same as if it had been filed and demurrer sustained thereto. In Shuey v. Hoffman, 224 Ky. 765, 7 S. W. 2d 202, 203, we said: "The legal sufficiency of a pleading may be tested by an objection to the filing thereof; the objection being treated as a general demurrer thereto." See also the cases cited therein.

We have carefully considered the tendered amendment and find that it contains nothing additional which would justifiably bring it within the provisions of the Code. There does seem to be an attempt to set up the existence of a controversy between the parties, in that appellants had tendered to appellee a proposed settlement of the estate which

they intended to make, to which she registered some objections. We only ask, where would we be going, if, in the settlement of estates properly to be made in the county court, we should follow a rule for administrators to submit a proposed settlement to those interested, and merely because of disapproval thereof, permit action to be brought in circuit court. It is the duty of the administrator to settle. One of the purposes of settlement in the county court is to give the parties interested an opportunity to file objections seasonably and properly. There is no reason why an exception should prevail in Jefferson County. This matter has been unreasonably prolonged. The settlement should be made as per the opinion in the former appeal.

The judgment is affirmed.

SMITH v. LOUISVILLE TRUST CO. ET AL. CITIZENS FIDELITY BANK & TRUST CO.

Court of Appeals of Kentucky.

March 6, 1951.

Rehearing Denied April 17, 1951.

Suit by Patricia R. Smith to enjoin the Louisville Trust Company, and others (Citizens Fidelity Bank & Trust Company), coadministrators of John A. O'Brien, deceased, from further prosecuting a second so-called settlement suit in the Jefferson Circuit Court. The Circuit Court, Chancery Branch, Second Division, Jefferson County, W. Scott Miller, J., dismissed plaintiff's petition and overruled her motion for reconsideration of the petition, and plaintiff appealed. The Court of Appeals, Van Sant, C., held that the matter had been unreasonably prolonged and that since two former opinions of the Court of Appeals had directed the coadministrators to make final settlement in the County

Court, the court below should have permanently enjoined the further prosecution of the second settlement suit.

Reversed with directions.

1. Executors and administrators

Basic requirement for settlement suit is that there be not sufficient personal estate for payment of debts, and mere fact that there are some disputed matters and possibly questions that should be litigated is not qualification for settlement suit in circuit court. Civ. Code Prac. § 429.

2. Injunction

Where second settlement suit was filed by coadministrators while second appeal of first settlement suit was pending, and where it appeared that amended petition filed in first suit after first appeal had been subject to same defects as original pleading, coadministrators should have been permanently enjoined from further prosecution of second settlement suit, in view of fact that two former opinions of Court of Appeals had directed coadministrators to make final settlement in County Court. Civ. Code Prac. § 429.

Walter B. Smith, Louisville, for appellant.

R. Lee Blackwell, Wm. Marshall Bullitt, Bullitt, Dawson & Tarrant, Irvin Marcus and Davis, Boehl, Viser & Marcus, all of Louisville, for appellee.

VAN SANT, Commissioner.

Appellant sought by her petition and motion permanently to enjoin appellees from further prosecuting a second so-called settlement suit in the Jefferson Circuit Court. The court dismissed plaintiff's petition. Plaintiff then filed motion for reconsideration of her petition. The court over-

ruled this motion and granted plaintiff an appeal to this court.

Appellees, co-administrators with the will annexed of John A. O'Brien, deceased, had instituted their first action in the Jefferson Circuit Court for a settlement of the estate of John A. O'Brien. Upon appeal to this court it was held that the petition did not state a cause of action for the settlement of the estate in that it did not contain the averments prescribed in Section 429 of the Civil Code of Practice. Smith v. Louisville Trust Co., 308 Ky. 189, 213 S.W. 2d 987.

Upon return of the above case to the circuit court, the co-administrators tendered an amended petition. Objection being entered thereto the court refused permission to file same but permitted the tendered amendment to be made a part of the record. The co-administrators then appealed to this court.

Soon thereafter and while this second appeal was pending, this second action was filed in the Jefferson Circuit Court seeking a settlement of the estate of John A. O'Brien, deceased. In the second appeal above the judgment was afterwards affirmed. Louisville Trust Co. v. Smith, 313 Ky. 15, 230 S.W.2d 64.

[1] It appears to be the position of the co-administrators that as long as there remain disputed questions they are entitled to bring action in the circuit court for the settlement of the estate. The mere fact that there are disputed matters and possibly questions that should be litigated, is not qualification for a settlement suit in the circuit court. One of the basic requirements for such suit is that there be not sufficient personal estate for payment of the debts.

It will be noted that this second attempted settlement suit was filed while the second action above was in the

process of appeal. The averments of the first action failed to meet the requirements of 429 of Civil Code of Practice. The tendered amendment, which was the subject of the second appeal, also failed in this respect. There could be no possible end to litigation should a party be permitted to file a series of attempted settlement suits.

Since this matter has been before us, another case has come and gone which had to do with the filing of a settlement of this estate in the county court, in which appellees claimed to have made a purported final settlement, subject to a few questions yet to be determined. Again we say this matter has been unreasonably prolonged.

The way has been opened and is now open for the final settlement in county court. Under two former opinions of this court appellees have been directed to make final settlement in the county court. Further unnecessary delay will be inexcusable.

[2] The court below should have permanently enjoined the further prosecution of this second settlement suit.

The judgment is reversed for entry of judgment consistent herewith.

SMITH v. LOUISVILLE TRUST CO. Ky. 479

Cite as 262 S.W.2d 479

SMITH v. LOUISVILLE TRUST CO. et al. (CITIZENS FIDELITY BANK & TRUST COMPANY)

Court of Appeals of Kentucky

Nov. 20, 1953.

Certain original papers in matter of deceased's estate disappeared from the Jefferson Circuit Court, Chancery Branch, First Division, after they had been transmitted there on appeal from county court. The Jefferson Circuit Court, Lawrence F. Speckman, J., entered an order, and

appeal therefrom was taken. The Court of Appeals, Cullen, C., held that where Circuit Court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, carbon copies furnished should have shown, in type form, any signatures that were on the originals.

Order reversed with directions.

1. Appeal and Error

Where certain original papers in matter of deceased's estate disappeared from circuit court after papers had been transmitted there on appeal from county court, circuit court and its commissioner, in proceeding to restore lost papers, employed proper procedure in having parties and their attorneys furnish carbon copies of such papers as were in their files, with each side to be given opportunity to examine and compare any copies furnished by the other side.

2. Records

Statutory methods for supplying lost records are not exclusive. KRS 422.200, 422.240.

3. Appeal and Error

Where certain original papers in matter of deceased's estate disappeared from circuit court after papers had been transmitted there on appeal from county court, and circuit court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, parties supplying carbon copies were not required to sign and certify the carbon copies.

4. Appeal and Error

Where certain original papers in matter of deceased's estate disappeared from circuit court after papers had been

transmitted there on appeal from county court, and circuit court and its commissioner, in proceeding to restore lost papers, properly had parties and their attorneys furnish carbon copies of such papers as were in their files, carbon copies furnished should have shown, in typed form, any signatures that were on the originals.

Walter B. Smith, Louisville, for appellant.

Davis, Boehl, Viser & Marcus, Bullitt, Dawson & Tarrant, Louisville, for appellees.

CULLEN, Commissioner.

The question on this appeal concerns the proper method of restoration of certain original papers in the matter of the estate of John A. O'Brien, deceased, which disappeared from the Jefferson Circuit Court after they had been transmitted to that court on an appeal from the county court. The appellant, Mrs. Smith, has an interest in the estate.

The circuit court directed its commissioner to hold hearings and take evidence for the purpose of "replacing and supplying authentic and certified copies" of the missing papers. The commissioner called in the parties and their attorneys and suggested that they furnish carbon copies of such of the papers as were in their own files, with each side being given the opportunity to examine and compare any copies furnished by the other side. This was done. The administrators and their attorneys supplied 28 copies, and Mrs. Smith and her attorney supplied 13. After examination by both sides, and after some minor corrections, the com-

missioner made a finding that the 41 papers so supplied were true and correct copies of the originals. His report was filed with the court, accompanied by the 41 papers.

Mrs. Smith filed objections and exceptions to the report, on the ground that the administrators and their attorneys should have been required to "sign and certify" the copies furnished by them, and that Mrs. Smith's attorney should have been permitted to "sign and certify" the copies furnished by him and by Mrs. Smith. The court overruled the objections and entered an order which confirmed the report of the commissioner and found that the supplied papers were "true, correct, and authentic copies" of the missing originals.

On this appeal from the order, by Mrs. Smith, the sole contention is that the parties who furnished the copies should have been required to sign and certify them.

[1, 2] We will state at the outset that in our opinion the procedure followed by the court and its commissioner in restoring the missing papers was proper. Although the statutes, KRS 422.200 and 422.240, provide methods for supplying lost records, it has been held that the statutory methods are not exclusive. See Deshong v. Cain, 1 Duv. 309, 62 Ky. 309; Com. v. Keger, 1 Duv. 240, 62 Ky. 240; Bush v. Lisle, 86 Ky. 504, 6 S.W. 330; Moore v. Shepherd, 189 Ky. 593, 225 S.W. 484; May v. May, 150 Ky. 522, 150 S.W. 685.

[3] We are not informed of any reason why the party who supplies a copy of a lost record should be required to sign and certify it, under the method of restoration employed in this case. The finding by the court that the papers are true and correct copies constitutes a sufficient cer-

tification, and no greater validity or effect would be imported to the copies by virtue of their being signed.

[4] However, we think it is essential that the supplied copies be complete to the extent that they show, in typed form, any signatures that were on the originals. For example, if one of the original papers was a signed letter, the copy should have the signature typed upon it, because otherwise it is not a true and correct copy.

The copies supplied in the case before us do not appear in the record on appeal, so we do not know whether they show the necessary signatures. However, from the arguments we gather that they do not. Under these circumstances, it is our opinion that the supplied copies are not completely true and correct.

The order appealed from is reversed, with directions that the court, either directly or through its commissioner, take such further proof as may be necessary to ascertain what signatures appeared upon the original papers, and cause such signatures to be typed upon the supplied copies.

It took until October 1954 to get the joint administrators to restore the records as the court ordered them to do.

510 BEN. MONROE'S REPORTS

SCOTT'S HEIRS vs. KENNEDY'S EX'R., etc.

Error to the Madison County Court.

Settlement of Administrator's Accounts. Notice.

Writs of Error.

CHANCERY. *CASE 98*

JUDGE MARSHALL delivered the Opinion of the Court.

January 15. Case stated.

At the May term, 1849, of the Madison County Court, the commissioners of accounts returned a settlement of the accounts of M. M. Kennedy as administrator of James

Scott, deceased, which was ordered to lie over until the next Court for exceptions. At the June term of the Court, the record states that the settlement having laid over one Court for exceptions, and none having been filed, "was examined and confirmed by the Court and ordered to be recorded." In September, 1851, a writ of error was issued in the name of the heirs and widow of James Scott, against the executrix of M. M. Kennedy, for the reversal of the order confirming the settlement and ordering it to be recorded. Various errors are assigned in the settlement. It is also assigned for error that the plaintiffs in error had no notice of the time and place of making the settlement, which, if the writ of error be sustainable, and if the alleged

fact be true and be a ground of reversal, would preclude the necessity of considering the other errors assigned.

The sixth section of the act of 1834, under which the commissioners have their authority, provides that when the executor or administrator shall apply to have his accounts stated and settled, the commissioners shall cause the heir, devisee or distributee, his or her guardian, if resident in the county, to be summoned to attend the settlement. And it is also provided by the fourth section that the settlement shall lie over for at least one term, for exception, and that if the Court shall approve the report or overrule the exceptions to it, shall be ordered to be recorded, and be deemed *prima facie* evidence of the facts stated in it.

We think it clear that the statute intended to provide a mode of settlement in which the parties interested should in general have an opportunity of questioning and investigating the matters involved, so that the settlement might be the better entitled to the character of *prima facie* evi-

dence. For this purpose the commissioners are directed to give notice, etc., and their report, when made, is to lie over for exceptions. But the fact that notice is dispensed with, if the heir, etc., reside out of the county, shows that the effect of the settlement as evidence does not depend entirely upon the fact of notice. And the direction that the report shall lie over for exceptions for at least one term, is undoubtedly one of the means provided for giving an opportunity of contesting it to those who may be interested in doing so. To parties residing in another county, no other means of knowledge or of contest are secured by the statute, but such as may arise from the notoriety of the proceedings of the County Court, and from the attention with which those who are interested in the management and settlement of estates may be presumed to regard the proceedings upon that subject. A settlement wholly *ex parte* is, of course, entitled to less weight and may be more easily overthrown, than one made upon due notice to all con-

cerned, and which has been subjected to the vigilance of parties opposed in interest. But in the absence of fraud or unfair intention, the want of notice to a resident of the county is no more calculated to detract from the weight of the settlement as evidence, than the want of notice to a non-resident of the county. And although it is certainly the duty of the commissioners to notify the resident party, the statute does not make their power to state and settle and report the accounts depend upon the exact performance of this duty. Suppose, the omission to cause the party to be notified, proceeds from ignorance of the commissioners as to their own duty, or from mere inadvertence, or from ignorance or mistake as to the residence of

the party; undoubtedly the County Court would remedy the omission if apprised of it, but the report might still be acted on, and finally confirmed and recorded; and so it might be, if the Court should proceed in ignorance of the fact that any duty had been omitted, and confirm the report at the second term without notice or appearance.

The commissioners are permanent officers chosen for the purpose of stating and settling the accounts of executors, etc., and sworn to perform their duties. The requisition that they shall cause the heirs, etc., to be notified if resident in the county, is, in our opinion, directory to them, and although a compliance is essential to the correct exercise of their powers, it is not essential to their existence, and although the omission of the notice may affect the credence due to their acts in the particular case, it does not, therefore, make void a settlement regular in other respects, made upon vouchers and other evidence accompanying it to the County Court, and there confirmed, after lying over as directed by law. The statute neither makes an *ex parte* settlement void, nor deprives it of all credence. And being made by sworn commissioners acting for the public and within the scope of their powers, it is under the statute and on general principles, and by common usage

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The statute directing County Court commissioners to give notice to the parties interested in estates of the time of settlements is but directory to the commissioner, and does not render a settlement made without notice void, notice according to the statute will be presumed, unless disproved.

applicable to such cases entitled *prima facie* to credence, so far as it accords with the evidence on which it professes to be founded, although that evidence may have been received *ex parte*, and with no other scrutiny than that which the commissioners must be presumed to have applied to it.

But although the statute requires the commissioners to cause the heir, etc., to be notified, if resident in the county, it does not require that they should state in their report either that the notice was given, or a reason why it was not given. (The assignment of error alleges as a fact that the plaintiff in error had no notice,) etc. But there is no other evidence of the fact, except in the failure of the commissioners to state in their report that notice was given, or that the heirs did not reside in the county; and before it can be assumed that the commissioners have been guilty of a breach of duty, with respect to giving notice, it must be assumed, from their silence on the subject, not only that they did not give it, but also that the plaintiff in error resided in the county, which is not even alleged. That is, we are to assume from their omission to state what they are not required to state, that they omitted to do what they were expressly required to do. And as there can be no proof upon the subject in this Court, this assumption founded upon the silence of the report, if it be made a ground of reversal, is in effect conclusive, and deprives the executor or administrator of the benefit of the settlement, though it must be admitted that notwithstanding the omission of the commissioners to say any thing on the subject, notice may have been given, or the fact may have existed which dispensed with it, or the parties in interest may in fact have had knowledge of the return of the settlement, or may have been actually in Court. But if there is to be no presumption in favor of the commissioners that they have performed a plain duty, it is to be recollected that they make their report to a tribunal which has general jurisdiction over the subject, and for which they have acted in stating and settling the accounts.

If the omission to say any thing about notice in the report is to be taken here as evidence that there was neither notice nor a proper ground for dispensing with it, we should presume that it is so regarded in the County Court, and that such a report would not be confirmed, unless the Court were satisfied that the requisition of the statute had been complied with, or unless the parties entitled to notice should appear, and the object of the statute be thus accomplished. It should be presumed that if the Court were satisfied that there was no notice when it should have been given, it would either recommit the report or cause the parties interested to be notified of its having been made, and allow them ample opportunity for investigation and exception. If the omission to say any thing on the subject is not regarded in the County Court as evidence that notice has not been given when it should have been, this would tend to prove that such omission is common, and therefore should not authorize the negative presumptions attempted to be deduced from it, and consequently should not authorize a reversal here. The record states that the settlement was examined by the Court; if so, its information tends to show that it was in the usual form, and the inference is that the Court either acted upon the presumption that the commissioners had done their duty with respect to notice, or that it was satisfied of the fact by an oral response from them.

And as the jurisdiction of the Court over the settlement and its confirmation did not depend upon the fact of notice, or of an excuse for not giving it, the failure to state upon its record that either had been proved before it, is not fatal to the proceeding, and does not even furnish ground for the assumption that no such proof was made. Besides, the

Court may, in this case, have known that the heirs did not reside in the county, or may have supposed such to have been the fact; and the contrary is not alleged, and if it were, it could not be proved in this Court. And even if the silence of the report should authorize the assumption that

no notice was in fact given, we do not admit that it authorizes the further assumption that the heirs resided in the county, and were entitled to notice. For, as already said, the power of the commissioners to make and report the settlement, and the power of the Court to act upon it, did not depend upon the fact of notice, or upon the existence of such facts as dispensed with it. And as the commissioner might omit to give notice in a certain state of facts, or rather, as they were required to give it only in a certain state of facts, if it were absolutely certain, or were expressly stated that they did not give it, the presumption should rather be, that the facts which required it did not, than that they did exist.

Notwithstanding these considerations, we are of opinion that the report of the settlement, in all cases, should state either that notice had been given, or the reason why it was not given. But the question here is, whether the order of the County Court ought to be reversed, because the report of the settlement makes no such statement. As a mere error in the form of the report the omission is certainly no ground of reversal, and it is not even assigned as such. And for the reasons already given, we think it should not be regarded in this Court as conclusive proof that notice was improperly withheld, even if that fact should be deemed a ground of reversal.

"But we are of opinion," that the order of the County Court confirming a settlement, without exceptions, in a

case in which it has jurisdiction is not such a final judgment or order as is the proper subject of a writ of error, or of revision and reversal by this Court on any ground. Because, 1. There is in such a case, no judicial contest, and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than of a judicial act. 2. There is no final adjudication or determination in favor of one person, or against another, or upon any ques-

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It is proper that all reports by county commissioners of the settlement of estates should show that notice was given or the reason why it was not.

An order of the County Court confirming the report of commissioners of the settlement of an estate with an administrator or executor is not such a final judgment or order as is the proper subject of a writ of error to the Court of Appeals. It is only prima fac.

tion of property or of personal rights. 3. The settlement

and its confirmation are not conclusive either upon the parties who may have been interested in opposing them, or upon the Court itself, which may order another settlement in which errors in the first may be corrected. 4. They are not conclusive in any other Court, but are only *prima facie* evidence, subject to be surcharged and falsified, and they operate rather as means of preserving evidence, to the preservation of which executors and other fiduciaries are entitled, than as judgments. And being made by sworn officers under the supervision of a Court, they ought to have, and have always had, the effect of *prima facie* evidence, whether made *ex parte* or not.

And, 5. While the application to them by this Court of the ordinary tests to which final judgments are brought for affirmance or reversal, might produce great mischief by subjecting to reversal many fair settlements made upon actual notice, after the fiduciaries and their witnesses are

dead, there is a safe, effectual, and well-known remedy, by bill in chancery, by which such settlements may be not only questioned upon their merits, with full opportunity to each party of adding proof, but the decree of credence to which they are entitled, so far as it depends upon notice or the want of it, may be fairly determined upon allegation and proof. The fact that in the many years during which the system of County Court settlements has been in operation with the effect of making them *prima facie* evidence, there has been, so far as we know, no single instance of a writ of error being sustained or prosecuted for the reversal of any one of them, is strong evidence that such remedy has always been considered as we now consider it, to be inappropriate, and not allowable.

We only add, that if this order were reversed, and there were another settlement in the County Court, the heirs would not thereby obtain final redress, but would probably still have to seek it by a bill in chancery, which is now open to them with the same effect, and with full right of surcharging and falsifying or correcting the settlement, which,

so far as it is erroneous upon its face in point of law, may be done more effectually in a suit in equity than by writ of error, which would probably be followed by such suit, and so far as its errors depend upon matters of fact, or extrinsic evidence can be finally disposed of better in a suit in chancery, than either here or in the County Court.

Judge Ilise does not concur in the foregoing reasoning and conclusions.

Wherefore, by order of a majority of the Court, the writ of error is dismissed.

Burton, for plaintiffs; *Turner*, for defendants.

Case 16—PETITION EQUITY—February 4.

Turley's Administrator v. Barnes, Etc.
Same v. Same.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. SETTLEMENTS OF FIDUCIARIES IN COUNTY COURTS—APPEALS FROM—EQUITY JURISDICTION.—No appeal lies from an order of the county court confirming a settlement with a fiduciary where no formal written exceptions were filed to the settlement, such order not being a final order; and the fiduciary may thereafter bring his equitable action in the circuit court to surcharge and correct the errors in that settlement.

H. B. KINSOLVING FOR APPELLANT.

1. Personal representatives are liable for the management of their trusts as bailees and agents are generally, and must answer, and only answer, for such losses as are occasioned by actual or constructive negligence, or wilful misconduct; in this case the allegations of the petition conclusively negative the existence of any single element of negligence, actual or constructive. Vol. 2, Leading Cases in Equity, 1791; Tuggle v. Gilbert, 1 Duval, 340; Henning v. Jones, 12 Bush, 504; Philadelphia Finance Co. v. The Estate of Law, L. R. A., vol. 14, 103; Faunstock's Appeal, 104 Penn., 46; Commonwealth v. McAllister, 28 Pa., 486; Reese v. Berington, 2 White and T. Leading Cases, 986.

2. Settlements by county courts of the accounts of fiduciaries are only *prima facie*, and may be surcharged in chancery by proper proceedings and purged of all errors where they were not contested in the county court. Scott's Heirs v. Kennedy's Executor, 12 B. M., 516;

Frazier v. Kavanaugh, Administrator, 4 Ky. Law Rep., 712; Bell v. Henshaw's Executor, 91 Ky., 430.

3. But this is not an action to surcharge the settlement, but an equitable action by the administrator against all of the heirs seeking equitable relief against all of them, according to their respective interests, from a *prima facie* liability against him raised by the settlements charging him with admitted assets, but all of which had, before he was allowed by the county court to make his settlement, been placed beyond his control without fault upon his part.

W. H. HOLT ON SAME SIDE.

1. A personal representative is not liable for the money lost which he had deposited in bank where he acts in good faith and the bank was in good repute. 7 Am. & Eng. Enc. of Law 350, and authorities there cited.

2. The settlement in the county court was only *prima facie* and added nothing to the liability of appellant for the funds lost without his neglect; it was not a judgment and did not fix his liability, and he could not have appealed therefrom, and therefore such settlement may be surcharged in chancery. Scott's Heirs v. Kennedy's Executor, 12 B. M., 415; 4 Ky. Law Rep., 712; Bell v. Henshaw's Executor, 91 Ky., 430; Brady v. Cooper, 12 Ky. Law Rep., 420.

TYLER & APPERSON FOR APPELLEE.

1. It is alleged in the petitions that appellant in his fiducial capacity made the settlements in the county court in which he was, without his consent and over his protest, charged with the money deposited in the New

Farmers Bank, which shows that he not only appeared in the county court but contested the very questions which he is now attempting to make in these actions; having contested the matter in the county court, and it there having been decided against him, his remedy was by appeal. Bell v. Henshaw's Executor, 12 Ky. Law Rep., 675.

2. An injunction to prevent the multiplicity of suits is allowed only when the subject matter of the various litigations, as well as the parties thereto are substantially the same; the pendency of other actions by various persons against a defendant for the same subject matter, affords no ground for such injunctions. High on Injunctions, sec. 65.

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Turley's Admr. v. Barnes, Etc.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

The parties to the records in these two cases being the same, the petitions being the same except as to the amount in controversy, and the two cases having been heard together and each having been dismissed on special demurrer to the jurisdiction of the court, and the legal question involved being the same in both cases, we will consider them together.

The petition alleges that while appellant was acting as administrator of Mahala Turley and as administrator, with the will annexed, of James Turley, deceased, he made a settlement of his accounts as administrator of each with the county judge of Montgomery county in 1894, in which settlements the county judge, "without his consent and over his protest," charged him in the case of Mahala Turley with the sum of $588.35, and in the case of James Turley with the sum of $2,094.28, which were deposited to his credit as

administrator in the New Farmers' Bank of Mt. Sterling, at the date of the assignment of the bank on the 26th day of July, 1893. The petition further alleges that the bank is insolvent and that it had paid 40 per cent. to its depositors and would probably pay not more than 55 per cent. in all, making a loss of 45 per cent. of such deposit in each case; that at the time he made these deposits in the bank for safe keeping it was in good repute and regarded as a safe institution; that he believed it to be perfectly solvent and acted in good faith and for what he regarded as the best interest of the heirs at the time the deposits were made. And this suit was brought to falsify and surcharge the county court

settlement, and asks that it be corrected by allowing him credit for actual loss upon the deposits so made by him, and for a restraining order enjoining the heirs at law from prosecuting suits to recover the balance due them on these items of alleged indebtedness, as shown by the county court settlement, until the case could be heard.

The defendants demurred to the petition on the special ground that the court had no jurisdiction of the subject matter of the action, and the court sustained the demurrer and entered a judgment dissolving the injunction and dismissing the petition; and we are asked upon this appeal to reverse that judgment.

It is urged by appellee that the settlement made in the county court by appellant is *prima facie* correct and enforcible, and that as it appears from the allegations of the petition that he made the settlements complained of in person and was charged, "without his consent and over his protest," with the whole amount of these deposits, that appellant had to litigate these items before the county court and that his remedy for alleged errors in the settlement com-

plained of is by appeal to the circuit court, under the provisions of section 978 of the Kentucky Statutes, which provides:

"Appeals may be taken to the circuit court from all judgments and orders of the county court in the settlement of accounts of personal representatives, assignees, guardians, trustees, curators, and other fiduciaries," and that having failed to prosecute the appeal as pointed out by the statute, he is estopped from maintaining this action to surcharge and falsify the settlements complained of.

By the provisions of article 5, chapter 35, Kentucky Stat-

utes, the county judge is authorized to make settlements with personal representatives, and he is directed to make a report, in writing, of such settlement showing each item of debit and credit and the general result of all the evidence heard and vouchers filed to the county court at its next regular term and noted of record, and section 1067 provides that this report shall lay over one term for exceptions to be filed by any person interested; that if no exceptions are filed by, or at the succeeding term of the court, the report shall if approved, be recorded; that if exceptions are taken, other evidence besides that reported may be heard, and the court shall, upon the whole case reject, alter or confirm the report, and if confirmed order it to be recorded; that any new evidence given in court must be reduced to writing and filed with the report; and that settlements so made shall be *prima facie* evidence between the parties.

In passing upon the question as to whether an order of a county court confirming a settlement, where no exceptions had been filed, was such a final judgment or order as to be the proper subject of revision and reversal by this court

on any ground, this court, in the case of Scott's Heirs v. Kennedy's Executor, 12 B. M., 515, said:

"There is in such a case no judicial contest and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than of a judicial act. Second. There is no final adjudication or determination in favor of one person or against another or upon any question of property or personal rights. Third. The settlement and its confirmation are not conclusive, either upon the parties who may have been interested in opposing it or upon the

court itself, which may order another settlement, in which errors in the first may be corrected. Fourth. It is not conclusive in any other court, but is only *prima facie* evidence, subject to be surcharged and falsified, and may operate rather as a means of preserving evidence, and the preservation of which executors or other fiduciaries are entitled, than as a judgment; and being made by officers under the supervision of the court, it ought to have, and has always had, the effect of *prima facie* evidence, but can always be questioned upon its merits by a bill in chancery."

And in the case of Stanbury's Admr. v. Robinson, 16 Ky. Law Rep., 310, this court again reviewed this question, referring to the case, *supra*, and held that the order approving the report of settlement made by the county judge and ordering it to be recorded, was not a final order.

In the case at bar, no formal written exceptions were filed to the report made by the judge to the county court of his settlement with appellant, nor was there any contest made in that court as to the validity of the charges complained of, or any judgment rendered passing upon the rights of the parties with reference thereto. And, while we think it clear

that if a party in interest shall file written exceptions to a settlement made by a fiduciary, and these exceptions are regularly tried by the county court upon their merits and a judgment entered sustaining or overruling them, the proper remedy to a party who feels aggrieved is by appeal as provided in section 978, yet we do not think that the effect of that statute is to take away from parties who do not file such exceptions or in any way contest in the county court the validity of charges complained of, the right to have

such alleged errors reviewed, by a bill in chancery. Nor is there anything in the opinion in the case of Bell v. Henshaw's Executors, 12 Ky. Law Rep., 674, which is in conflict with this view. In that case the court says that a devisee or party in interest can not contest a settlement by a fiduciary in both the county and circuit courts, and that when he tests its validity in the county court his remedy is by appeal.

The fact that at the date of the settlement appellant verbally objected to being charged with the full amount of money on hand to his credit in the bank at the time of its failure, was not equivalent to the filing of formal written exceptions to those charges, and the question of his liability for these items was not litigated in the county court. The mere formal entry of the order of confirmation of the settlement, no exceptions having been filed thereto, was not a final judgment conclusive of the rights of the parties from which appeal could be taken, and which precludes appellant from bringing his suit to surcharge and correct the alleged errors in the settlement and to restrain the prosecution of suits for the collection of the balances found to be due by the heirs growing out of such errors.

The judgment is therefore reversed and cause remanded for proceedings consistent herewith.

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STANBERRY'S ADM'R v. ROBINSON, &c.

(Filed October 18, 1894—Not to be reported.)

1. Administrator—Excessive commission allowed—This court will not disturb the finding of a court of chancery which, upon appeal, reduced the commission of 5 per cent. on $240,000, the amount disbursed, allowed by the county court to the administrator of the decedent's estate, as the allowance of the county court was flagrantly excessive by reason of the fact that the administrator came into possession of the estate without trouble or litigation; that he turned over to the heirs the stocks, bonds, etc., of the decedent in bulk and in kind; that his attorney, to whom an allowance was made, prepared all necessary releases, and the whole transaction was of the simplest character.

2. Same—Allowance for services as agent of decedent—The administrator was not entitled to compensation for services rendered decedent as her agent in collecting her

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rents, interest, etc., as she had paid him for those services before her death and died believing that he was satisfied and had no further claim.

3. Appeals—Time of appeals to circuit courts—A partial settlement having been made by the administrator, and the final settlement some months later, at which exceptions were filed by the heirs of the decedent and passed upon by the county court, an appeal taken to the circuit court sixty days from the final settlements is in compliance with the requirements of the statute regulating appeals in such cases. No exceptions were filed at the first settlement,

which was a partial one. The administrator still had in his hands funds for the future disposition of the court, and the county court still retained control of the question of allowance to the administrator or of any other matter embraced in the settlement. At the first settlement the order approving the report of the county judges and ordering it to be recorded was not a final order.

4. Same—Circuit courts—In the statute providing for appeals to the circuit court in cases of this kind "the words 'circuit courts' shall be construed to mean any court of similar jurisdiction, either criminal, ordinary or equitable."

W. H. Mackoy, for appellant.

Root & Root for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Hazelrigg.

Mrs. Cecilia B. Stanberry died intestate in April, 1889, the owner of a large personal estate, and on May 13th following Geo. W. Neff was appointed by and qualified before the Campbell County Court as her administrator.

The estate was singularly free from complications, and on June 24, 1889, the administrator turned over in bonds, stocks, etc., to the heirs of the decedent more than $210,000, for which he took their joint receipt.

In a partial settlement made in the Campbell County Court on August 1, 1889, the total amount of disbursements was $213,924.28, and on this sum that court allowed the administrator 5 per cent. or $10,696.21 as his commission.

In June, 1891, a second and final settlement was made, and on the additional amount found to have been distributed, viz., $28,349.65, the county court allowed the administrator the same percentage, or $1,371.25, making the total amount allowed him as compensation the sum of $12,067.46. The county judge also allowed him the sum of $3,000 for services as agent for the decedent in collecting her rents, interest, etc., for a period of some eight years immediately preceding her death.

The first settlement was ex parte, but at the final settlement the heirs of Mrs. Stanberry appeared and filed a number of exceptions, none of which, however, need be noticed here, save those going to the amount of the allowance to the administrator and the charge for services as agent. These exceptions were overruled by the county court, but on appeal to the Campbell Chancery Court the heirs the allowance to Neff as administrator was reduced by $6,000, and his demand as agent was rejected altogether. From that judgment Neff appealed to this court, where the appeal is being prosecuted by his administrator, he having since died.

It is insisted that the allowance of 5 percentum upon the amount received and distributed was reasonable and should not have been disturbed; that the chancery court

had no jurisdiction of the appeal because more than sixty days elapsed from the time of confirming the settlement allowing the commission complained of in the county court until the appeal was taken to the chancery court, and because the statute provides for appeals in cases of this kind to circuit courts only, and not to chancery courts; that the claim of $3,000 was reasonable and should have been allowed.

On the question of the administrator's compensation we are not disposed to disturb the finding of the lower court. He came into the possession of the entire estate without trouble or litigation. He turned over to the parties ready to receive them the stocks, bonds, etc., of the decedent in bulk and in kind. His attorney, to whom an allowance of $1,000 was made, prepared the necessary releases, and the whole transaction was of the simplest character. The

promptness of the administrator is to be commended, but it is not thought that he earned more than the sum given him by the chancery court. It seems to us that the allowance by the county court was flagrantly excessive.

We do not think that the limitation of sixty days, within which an appeal may be prosecuted from the orders and judgments of county courts to circuit courts, is applicable to cases like the one under consideration.

The judge of the county court is given authority to settle the accounts of fiduciaries when called on for that purpose. His "report in writing shall be returned to the county court at its next regular term and noted of record. The report shall show the result, giving items of debit and credit, and he shall return therewith all vouchers and evidence adduced before him on the settlement." The clerk shall "indorse on the report the time of filing the same, and it shall lay over one term for exceptions to be filed by any person interested." "If no exceptions are filed by or at the succeeding term of the court, the report shall, if approved, be recorded." If the exceptions are taken the court shall, upon evidence heard on the whole case, "reject, confirm, alter or amend the report, and, if confirmed, order it to be recorded." "Settlements so made and recorded shall be *prima facie* evidence between the parties." (Subsections 1 to 10 inclusive, section 2, article 14, chapter 28, General Statutes.)

In this case there were no exceptions filed to the first settlement, which, as we have seen, was only a partial one. The administrator still retained in his hands some $40,000 for the future disposition of the court. We are of opinion that the county court still retained control of the question of allowance to the administrator, or of any other matter embraced in the settlement. The order approving the report of the county judge and ordering it to be recorded was

not a final order. As said by this court in a case precisely similar to this:

1st. "There is in such a case no judicial contest and no judicial decision, but the order of confirmation" (approval in our present statute) "partakes rather of the character of a ministerial than of a judicial act.

2d. "There is no final adjudication or determination in favor of one person or against another, or upon any question of property or of personal rights.

3d. "The settlement and its confirmation are not conclusive either upon the parties who may have been interested in opposing them or upon the court itself, which may order another settlement in which errors in the first may be corrected." (Scott's heirs v. Kennedy's ex'or, 12 B. M. 510.)

Within sixty days from the judgment of the Campbell County Court, passing on the exceptions of the heirs to the

final settlement of the accounts of the administrator of Mrs. Stanberry, an appeal was taken to the Campbell Chancery Court, and this, we think, was in compliance with the requirements of the statutes. That such an appeal might go to the chancery as well as to the circuit court appears clear.

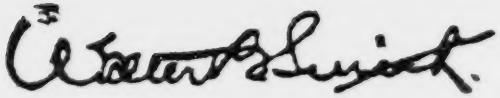
"The words 'circuit courts' shall be construed to mean any court of similar jurisdiction, either criminal, ordinary or equitable." (Section 28, chapter 21, General Statutes; see also section 14, title 17, Civil Code.)

Of the demand of Neff as agent the chancellor said: "The appellee (Neff) was a friend of Mrs. Stanberry. She was his friend. She received a large estate upon the death of her husband in 1881. The appellee did assist her in the management of her business. It was not complicated or

difficult. She paid him $50 for every month during the eight years in which she enjoyed the estate for his services. She did not agree to pay more, nor did he signify that he desired greater compensation. She died in the belief that he was satisfied and had no further claim. It did not occur to him to suggest this claim in August, 1889. He had received $4,800 in the lifetime of the intestate for these services. It did not occur to him to assert the claim until 1891. He might have been entitled to more than $600 per year upon a quantum meruit, if he had not allowed her to believe that she was paying him all that he claimed."

We approve these conclusions. The motion of the administrator de bonis non of Mrs. Stanberry to be made a party appellee here is overruled. The balance in the hands of the former administrator is not an unadministered asset.

Judgment affirmed.



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SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 839

PATRICIA R. SMITH, - - - - - Petitioner,

vs.

See *Louisville Trust Co., etc. v. Smith*, 192 F. Supp. 396 (First Appeal dismissed, 295 F. 2d 107); 330 F. 2d 483; Opinion overruling Petition for Rehearing, Appendix "D," pp. 2576a-2579a, not reported.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased, - - - - - Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for Writ of Certiorari to United States Court of Appeals, Sixth Circuit.

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SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 839

PATRICIA R. SMITH, - - - - *Petitioner,*

v.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators With the Will Annexed of the Estate of John A. O'Brien, Deceased, - - - *Respondents.*

RESPONDENTS' BRIEF

In Opposition to Petition for Writ of Certiorari to United States Court of Appeals, Sixth Circuit.[1]

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COUNTER-STATEMENT OF THE CASE.

Petitioner's petition for *certiorari* so totally fails "to present with accuracy, brevity, and clearness" that "concise statement of the case" essential to a ready understanding of the questions presented, as required

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[1]The Petition's Appendix A (statutory provisions, etc.) will be cited A. "A", p. ——: its Appendix B (Vol. I Transcript of Record) will be cited A. "B", p. ——: its Appendix C (Vol. II Transcript of Record) will be cited A. "C", p. ——: and its Appendix D (Vol. III Transcript of Record) will be cited A. "D", p. ——.

by this Court's Rules[2] that Respondents must briefly restate the essential facts.

1. *Nature of Suit.* This is Respondents' *statutory* suit under KRS 396.140, to recover from Petitioner for an overpayment (or overdistribution) to her, as a distributee of the estate of her former husband, John A. O'Brien, who died January 1, 1934 (A. "B", pp. 16a-45a, at 42a-43a).[3]

It is not, in any sense, an estate "settlement suit" or a suit to settle a decedent's estate, which Petitioner repeatedly asserts it to be (Petition, pp. 12, *et seq.*).

2. *O'Brien Family controversies; Petitioner's Compromise of them.* Immediately after Mr. O'Brien's death, Petitioner—ably assisted by competent attorneys, accountants and business advisors (A. "B", pp. 61a-67a)— had many controversies with Mr. O'Brien's family concerning his interest in the E. J. O'Brien & Co. family partnership and his $200,000.00 life insurance and large security holdings (A. "B", pp. 58a-61a).

She finally concluded them by a Compromise Settlement (dated Nov. 4-15, 1935, A. "B", pp. 68a-71a), which in due course was carried out, under which she (*a*) sold Mr. O'Brien's partnership interest for $380,000.00, (*b*) became undisputed beneficiary of and collected his $200,000.00 insurance, and (*c*) the O'Brien Family recognized her as the sole distributee of his whole estate including his large security hold-

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[2]Supreme Court Rule 23-1 (e) and 4.

[3]On September 30, 1944, Mr. O'Brien's widow, the Petitioner, married Walter B. Smith, her attorney herein (A. "B", p. 16a).

ings and other intangibles, all aggregating $707,532.57 (A. "B", pp. 73a-75a).

3. *Petitioner's Rescission Suit.* On March 10, 1937, Petitioner (then Mrs. O'Brien), in repudiation of her Compromise Settlement, sued the entire O'Brien Family and the Respondents, to rescind her compromise, alleging their fraud, etc. (A. "B", pp. 77a-78a; A. "C", pp. 1411a-1439a).

After over seven years of litigation, including a 15-day oral trial (2,000 pages of evidence), she *lost* her Rescission Suit in the lower court (A. "C", pp. 1491a-1545a), and on appeal (*O'Brien* v. *O'Brien,* 294 Ky. 793; cert. den. 321 U. S. 767, reh. den. 322 U. S. 769), the Kentucky Court of Appeals holding that her Compromise Settlement

> "was a *fair and reasonable* settlement and contract of purchase and sale" (294 Ky. at 820).[4]

4. *Respondents' Final Settlement of Mr. O'Brien's Estate, in Jefferson County Court.* On June 21, 1950, Respondents filed in Jefferson County Court their accounts for a Final Settlement of Mr. O'Brien's estate (A. "B", Complaint's Exhibit No. 1, pp. 46a-93a).

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[4]Meanwhile, on February 18, 1937, Respondents had sued in the Jefferson *Circuit* Court (a Kentucky court of general jurisdiction) to settle Mr. O'Brien's Estate, which on Petitioner's motion remained in abeyance to enable her to conclude her Rescission Suit litigation; but upon its conclusion and upon Petitioner's insistence that Respondents should settle the estate in Jefferson *County* Court(Kentucky's probate court), the Kentucky Court of Appeals upheld her insistence and directed that the settlement be made in such County Court (A. "B", pp. 76a-77a; *Smith* v. *Louisville Trust Co.,* 308 Ky. 189, and *Louisville Trust Co.* v. *Smith,* 313 Ky. 15).

For nearly two years Petitioner contested, objected to, and sought to prevent, the Respondents' Final Settlement, by numerous proceedings in the County Court, including her repeated objections, injunction proceedings against the County Judge (*Smith* v. *Shamburger, Judge,* 314 Ky. 850), her unsuccessful attempt to remove the Final Settlement proceeding to Federal Court, etc.[5]

Ultimately, and despite all her contesting of and objections to Respondents' Final Settlement, the County Court, by its September 8, 1950, Order held that Respondents' County Court proceeding

> "is a *final settlement* of their accounts as Co-Administrators" (A. "B", p. 997a);

and by its March 5, 1952, Judgment and May 1, 1952, Amended Judgment (A. "B", pp. 27a-35a; also summarized in District Court Opinion, 192 F. Sup. at 403-405), the County Court (1) **adjudged** that

> "The Estate of John A. O'Brien, deceased, be, and the same hereby is, *finally* settled",

and (2) **awarded** the Respondents and their attorneys compensation for their estate services aggregating $73,756.98 credited by $30,788.86 estate assets held for payment thereof.

Petitioner never appealed to Jefferson Circuit Court from such County Court Judgment and Amended Judgment, within the 60-day period allowed

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[5]Her 19 separate proceedings in her contest of the settlement are summarized by the Court of Appeals (330 F. 2d 483, at pp. 488-489; A. "D", pp. 2369a-2381a, at pp. 2378a-2380a).

by Ky. Civ. Code § 729; KRS 23.030 (2), or at all, and they became final and no longer appealable.

5. *This "over-distribution" Suit.* While the probate court (County Court) thus concluded and determined the *rights* of all parties and adjudged and awarded the personal representatives administration compensation, etc., it could not enforce its award (where there is insufficient estate assets for its payment) by the remedy of *execution*. The personal representatives' *enforcement remedy* is provided by KRS 396.140 as follows:

> **"396.140 [3877] Overpayment; recovery of.** When a personal representative pays * * * to a distributee * * * a part or all of his share of legacy, under a mistake as to the solvency of the estate or otherwise, he may recover from the * * * distributee * * * the amount of the overpayment, with interest."

Respondents pursued that statutory remedy in this suit which they commenced in Jefferson Circuit Court (A. "B", pp. 16a-45a), and which Petitioner removed to Federal Court upon the ground of diversity of citizenship (A. "B", pp. 2a-12a).

6. *Petitioner's Counterclaim, Amended Counterclaim and Second Amended Counterclaim.* Petitioner's original Counterclaim charged that Respondents, through "negligence, misconduct and disloyalty", caused her a loss of $822,035.04 difference between what she claims was the worth of Mr. O'Brien's partnership interest and the $380,000.00 for which she sold it (A. "B", pp. 134a-139a) in her Compromise Settle-

ment with the O'Brien Family. The District Court dismissed it upon the grounds that it was

(*a*) Barred by Kentucky's limitations statutes, KRS 413.120 as extended by 413.130, 413.160, and 413.090 (*Louisville Trust Co.* v. *Smith*, 192 F. Supp. at 399-401; A. "C", pp. 1609a-1614a); and

(*b*) Barred by the rule of *res judicata*, by the Judgment of May 23, 1940, in her above Rescission Suit (A. "C", pp. 1491a-1545a), which Respondents pleaded in their Amended Reply (A. "C", pp. 1384a-1390a; see *Louisville Trust Co.* v. *Smith*, 192 F. Supp. at 401-402).

Petitioner moved for leave to file her Amended Counterclaim (see A. "B", pp. 176a-224a) and her Second Amended Counterclaim (see A. "C", pp. 1706a-1746a) which, aside from asserting a multitude of evidentiary details, added nothing factually to her original Counterclaim or to avoid the defenses of limitation and *res judicata*. The District Court *denied* leave, upon the ground that while leave to amend should be "freely extended", nevertheless "when the amendment asserts no claim or defense" leave to amend should be withheld (*Louisville Trust Co.* v. *Smith*, 192 F. Supp. at 407; A. "C", pp. 1625a-1626a).

7. *The Summary Judgments.* The District Court entered its Summary Judgments finally dismissing Petitioner's original Counterclaim, and denying her leave to file her Amended and Second Amended Counterclaims; and in favor of Respondents for the amount

of the County Court's March 5, 1952, award of administration compensation, etc., less the credit, with interest (A. "C", pp. 2092a-2093a); and on her appeal, Sixth Circuit *affirmed*, except for disallowance of interest prior to the November 9, 1962, date of the Summary Judgments (*Louisville Trust Co.* v. *Smith*, 330 F. 2d at 489; A. "D", at pp. 2381a and 2368a).

WHY THE CAUSE SHOULD NOT BE REVIEWED.

First: The petition for certiorari totally fails "to present with accuracy, brevity and clearness" what is essential for an understanding of the points raised.

Her 215-page petition is cast with a chaotic review of the nearly twenty-eight years of Petitioner's numerous litigations over Mr. O'Brien's estate (some of which the District Court summarized in its Opinion, 192 F. Supp. at 398), in various state courts and in the federal courts, which has been characterized by her attempts at writs of prohibition and injunctions against state court judges and disqualification by affidavits of bias and otherwise of federal court judges (A. "C", p. 1608a), to such an extent that the Court of Appeals, in denying Petitioner's 114-page Petition for Rehearing (A. "D", pp. 2461a-2575a) in which she complained of deprivation of due process of law and equal protection of the laws, commented:

> "To the contrary, the record shows that appellant has presented her contentions in protracted litigation in various courts for more than a quarter

century, * * *. *Rare indeed is a litigant who has had more days in court than has appellant"* (A. "D", p. 2578a).[6]

For that violation of this Court's Rule 23-4, the petition should be denied.

Second: In view of the petition's total failure to comply with this Court's Rule 23-4, Respondents can only speculate as to what Petitioner actually means in her vague and conglomerate statements of what she claims are the questions for review (Petition, pp. 6-8) and the reasons upon which she relies for allowance of the writ (*Id.*, pp. 126-215).

I. Petitioner's assertion that the Court of Appeals decided an important question of Kentucky law in conflict with applicable Kentucky law (Petition, pp. 6-7) is totally devoid of merit.

She predicates her assertion upon her utterly erroneous claim that the District Court was in some way making or approving a "final settlement of the accounts of an estate." That is not so. The final settlement already had been made by the Jefferson County Court (probate court) by its March 5, 1952, Judgment and May 1, 1952, Amended Judgment (p. 4, *supra*), which the District Court correctly held created in the Respondents

> "a right to recover from the defendant an amount equal to the approved expenses and fees [which

[6]Petitioner's chaotic review includes vast material indiscriminately included in and lifted out of her 4-volume 2,625-page Appendix which accompanies her petition, which itself is filled with utterly irrelevant contentions in her "protracted litigation in various courts" to which the Court of Appeals referred.

that probate court had *already adjudged*] in excess of the moneys in the hands of the administrators" (192 F. Supp. at 399)—by this suit under KRS 396.140.

That County Court adjudication of the expenses and fees determined their amounts. KRS 396.140 (p. 5, *supra*) provided the remedy for enforcement of collection of their already adjudicated and determined amounts.

Respondents' suit did not seek, nor did the District Court undertake to adjudge, any approval or disapproval of the probate court's final settlement. On the contrary, the District Court referred to lack of a District Court's "jurisdiction over probate matters" (192 F. Supp. at 402; A. "C", p. 1616a), and then addressed itself to determination of whether the Respondents' settlement of their accounts in the probate court was a "final settlement" from which Petitioner's only remedy was by appeal within the 60-day period allowed by the Kentucky statutes (pp. 4-5, *supra*). The District Court determined that it was such a "final settlement", saying that

> "This Court is completely satisfied that the defendant took part in and participated in the settlement of the final account within the meaning of the Kentucky law. *Logan's Adm'rs* v. *Troutman's Ex'r*, 1820, 3 A. K. Marsh. 66, 10 Ky. 66; *Bell* v. *Henshaw's Ex'rs*, 1891, 91 Ky. 430, 15 S. W. 3; *Turley's Adm'r* v. *Barnes*, 1898, 103 Ky. 127, 44 S. W. 446; *Welch* v. *Lewis, et al.*, 1898, 104 Ky. 531, 47 S. W. 454. She cannot now be permitted to challenge this settlement in this action.

> Her remedy was by *appeal* to the Jefferson County Circuit Court, and thereafter, if she desired, to the Court of Appeals of Kentucky. It is *not* for this Court at this time to *review* the findings of the County Court of Jefferson County upon which the County Court based *its* final judgment approving the final settlement filed by the plaintiff administrators" (192 F. Supp. at 407).

The Court of Appeals, in affirming, also held that the probate court settlement was a "*final settlement*", and summarized the nineteen separate proceedings which Petitioner took in contesting and resisting and trying to prevent the settlement, which made it a "final settlement" (330 F. 2d at 488-489; A. "D", pp. 2378a-2380a). After an elaborate review of the Kentucky decisions, it concluded that despite Petitioner's failure to pursue "the conventional procedure in Kentucky" of filing technical or "formal" exceptions to a fiduciary's account "to contest the settlement", Petitioner so *participated* in the settlement proceedings that "her sole remedy was to appeal from the settlement in the state courts"—which she did not do—saying:

> "Upon the basis of the authorities hereinbefore cited [*Bell* v. *Henshaw's Ex'rs.*, 91 Ky. 430; *Turley's Adm'r.* v. *Barnes*, 103 Ky. 127; *Smith* v. *Shamburger, County Judge*, 314 Ky. 850], however, we construe the Kentucky rule to be that if the appellant participated in the settlement proceedings by contesting, resisting, objecting to or challenging the accounts, the settlement became *final* and binding upon her even in the absence of

> *formal* exceptions, and her *sole* remedy was to *appeal* from the settlement in the state courts. We agree with the District Court that appellant 'took part in and participated in the settlement of the final account within the meaning of Kentucky law,' and that '[s]he cannot *now* be permitted to challenge this settlement in this action' " (330 F. 2d at 488; A. "D", p. 2378a).

Indeed, the Court of Appeals referred to Petitioner's injunction suit against County Judge Shamburger (*Smith* v. *Shamburger*, 314 Ky. 850) in which she sought to enjoin him from proceeding to make "a *final* settlement" and said that in it

> "the Kentucky Court of Appeals explicitly pointed out that the County Court has *judicially determined* the accounting filed by the joint administrators to be 'a *final* settlement' * * * and that * * * appellant herein, 'can obtain adequate relief therefrom by an *appeal*' " (330 F. 2d at 488; A. "D", p. 2377a)—but she never appealed.

The Court of Appeals decision not only was *not* in any conflict with any applicable Kentucky law, but on the contrary precisely followed and applied the Kentucky law.

II. Petitioner's next assertion that the Court of Appeals violated Rule 15 of the Federal Rules of Civil Procedure, in not permitting her to file her Amended Answer and Amended Counterclaims (Petition, p. 7), is equally without merit.

First, by those amendments she simply sought to "re-litigate" claims against Respondents, which al-

ready had been adjudicated in the probate court "final settlement".

Second, her counterclaims, even if not previously foreclosed, had become barred by Kentucky limitations statutes (p. 6, *supra;* A. "B", pp. 146a-148a).

Third, her counterclaims, even if not barred by limitations, were barred under the rule of *res judicata,* by the Judgment of May 23, 1940, in her Rescission Suit (p. 6, *supra;* A. "C", pp. 1491a-1545a) which the Kentucky Court of Appeals affirmed against her (*O'Brien* v. *O'Brien,* 294 Ky. 793) and in which this Court denied *certiorari* (*O'Brien* v. *O'Brien,* 321 U. S. 767) and a rehearing (322 U. S. 769)—and as held by the District Court (192 F. Supp. at 401-402) and the Court of Appeals (330 F. 2d at 485-486).

Finally, while the District Court, in denying leave to file her amendments, recognized that Rule 15 requires that leave to amend be "freely extended", it correctly denied leave under the well established rule that the right not be extended "to a litigant when the amendment asserts no claim or defense" (192 F. Supp. at 407).

That rule is axiomatic (*Laughlin* v. *Garnett,* 138 F. 2d 931, C.A. D.C.; *Stephens* v. *Reed,* 121 F. 2d 696, C.C.A. 3; *Shall* v. *Henry,* 211 F. 2d 226, C.A. 7; *Overfield* v. *Pennroad Corp.,* 39 F. Supp. 482, D.C. Pa.; *American Securit Co.* v. *Shatterproof Glass Corp.,* 166 F. Supp. 813, D.C. Del., affirmed 268 F. 2d 769, C.A. 3, cert. den. 361 U. S. 902).

III. Petitioner's next assertion is that denial of leave to her to file her Amended Counterclaims sanc-

tions "a radical departure" from "accepted standards of judicial procedure" (Petition, pp. 7-8).

As said above, amendments which assert no valid claim or defense, and which, as said by the Third Circuit in *Stephens* v. *Reed*, 121 F. 2d 696, "would avail the offerer nothing if allowed", should *not* be allowed.

IV. Petitioner's final claim for the grant of review is that she has been denied due process of law under the Fourteenth Amendment, by denial of what she describes as "a trial on the issues involved in the action" (Petition, p. 8).

First, there was "no genuine issue as to any material fact", and the District Court's Summary Judgments so found (A. "C", p. 2092a).[7]

Rule 56 of Federal Rules of Civil Procedure, with reference to summary judgments, does not require any "trial" where there "is no genuine issue as to any material fact".

On the contrary, in such a case there is no constitutional right to trial by jury (*Lindsey* v. *Leavy*, 149 F. 2d 899, 902, C.C.A. 9; *In re Georgia Jewelers, Inc.*,

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[7]Every material fact was established by Petitioner's own admissions in her pleadings and properly authenticated records of judicial proceedings to which she was a party, *i.e.*:

(*a*) By Petitioner's admissions in her Answer and Counterclaim (A. "B", pp. 121a-139a) of the Complaint's allegations (A. "B", pp. 13a-45a), and its Exhibit 1 (A. "B", pp. 53a-93a) which was duly verified (A. "B", p. 93a, pp. 982a-983a) and authenticated by the Clerk's certificate (A. "B", pp. 1091a-1092a) to Petitioner's Exhibit No. 33 (A. "B", pp. 993a-1091a) to her Supplemental Affidavit (A. "B", pp. 472a-482a); and

(*b*) By Respondents' Exhibits Nos. 1, 2, 3, 4, 5 and 6 (A. "C", pp. 1391a-1545a) to their Amended Reply to Petitioner's original Counterclaim (A. "C", pp. 1383a-1390a)—which exhibits were duly authenticated by the Clerk's certificate (A. "C", pp. 1545a 1546a).

219 F. Supp. 386, 399, D.C. N.D. Ga.). The summary judgment procedure "does not infringe the constitutional right of a party to a trial by jury" (*Securities and Exchange Commission* v. *Payne*, 35 F. Supp. 873, 876, D.C. S.D. N.Y.; *cf. Fidelity and Deposit Co.* v. *U. S.*, 187 U. S. 315, 320).

Secondly, as said in the Court of Appeals' unpublished opinion (A. "D", pp. 2577a-2579a) denying Petitioner a rehearing, which she had sought upon the ground of deprivation of due process and equal protection, Petitioner

> "has presented her contentions in protracted litigation in various courts for more than a quarter century"

and

> "Rare indeed is a litigant who has had more days in court than has appellant. We find no violation of the Fourteenth Amendment" (A. "D", p. 578a).

CONCLUSION.

Petitioner has litigated, or had the opportunity to litigate, every contention she now makes "in protracted litigation in various courts for more than a quarter century" (A. "D", p. 2578a). She has been deprived of no rights. Means for starting all "over again" or continuing her contentions should not be provided.

The petition for certiorari should be denied.

9 February 1965.

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Respondents.

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Louisville, Ky. 40202,
Of Counsel for Citizens Fidelity Bank and Trust Company.

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, (formerly Fidelity and Columbia Trust Company), JOINT ADMINISTRATORS with the Will Annexed OF THE ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit

Office Supreme Court, U.S.
FILED
MAY 10 1965
JOHN F. DAVIS, CLERK

WALTER B. SMITH
800 Columbia Building
Fourth and Main Streets
Louisville, Kentucky
Counsel for Petitioner

May 10, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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(1) The Jefferson County Court did not, and could not legally make a "final settlement" of Respondents' accounts as Co-administrators, and "could not legally adjudge the estate to be finally settled", as long as the Joint administrators retained $30,788.86 plus interest compounded at the rate of 6% for 29 years which they have illegally withheld (in violation of Kentucky Statutes) belonging to the O'Brien Estate of which Mrs. Smith is the sole beneficiary 27

(2) Mrs. Smith was not present, and she was not represented by her counsel, at any of the hearings and proceedings, in the Jefferson County Court, when the two Trust Companies and their attorneys

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were awarded $73,756.98 additional attorneys' fees, and fees for the two Trust Companies, in violation of their written contracts and agreements, and they were not entitled to any fees, because they did not render any services to the O'Brien Estate 28-30

(3) The Joint Administrators did not file in the within case, any copy of any "Transcript of Testimony with Report and Supplementary Report of Commissioner, and the Order confirming the Commissioner's Reports, taken in Re: Estate of John A. O'Brien, Deceased, No. 24146, taken in Jefferson County Court Probate Division, from July 1951, through January 1952, wherein the Joint Administrators filed over 82 Exhibits, during the uncalled for and unnecessary expensive hearings and proceedings, at which neither Mrs. Smith or her counsel were present, which when printed consisted of 233 printed pages", it was not filed in the within case in any Court and if it was submitted with the Petition for Writ of Certiorari to this Court, it should not be considered by this Court, and if it is now with the Record of the within case, in the Supreme Court, it should be expunged from the Records in the within case in this Court 29

(4) The Petitioner Mrs. Smith could not legally appeal from the Jefferson County Court "purported final settlement", because the County Court could not enter an in personam judgment, upon which the Joint administrators could levy an execution, and because Mrs. Smith did not file any exceptions to the purported final settlement of the Joint Administrators' accounts of the O'Brien Estate in the Jefferson County Court 30

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FEDERAL RULES OF CIVIL PROCEDURE:

Rule 15 55
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Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

PATRICIA R. SMITH, *Petitioner,*

vs.

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, (formerly Fidelity and Columbia Trust Company), JOINT ADMINISTRATORS with the Will Annexed OF THE ESTATE OF JOHN A. O'BRIEN, Deceased, *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner Patricia R. Smith, prays that this Court grant a rehearing of its Order of March 15, 1965, denying the Petition For Writ of Certiorari, 85 S. Ct. 1024, (1965),

and that a writ of certiorari issue to review the summary judgments of the Court of Appeals for the Sixth Circuit in the above-entitled case as prayed for in the Petition For Writ of Certiorari filed on January 16, 1965, herein.

On March 16, 1965, counsel for the Petitioner filed in the United States Court of Appeals for the Sixth Circuit, a "Motion To Stay Issuance Of Mandate On The Order Filed And Entered On March 15, 1965, In The Above-Entitled Case, Which Is Now 'No. 839' In The Supreme Court Of The United States, Denying The Petition For Writ Of Certiorari, Until April 9, 1965, And To Stay The Mandate Until Final Disposition Of A Petition For Rehearing To Be Filed For Patricia R. Smith In The Supreme Court". The said Motion was granted and an Order was filed and entered on April 1, 1965, to stay the Mandate until April 9, 1965.

On April 2, 1965, before the expiration of twenty-five days from the day the Order was entered on March 15, 1965, denying the Writ of Certiorari, counsel for the Petitioner filed in this Court, a "Motion For An Extension Of Time Within Which To File A Petition For Rehearing On This Court's Order Denying The Petitioner's Petition For Writ Of Certiorari". The said Motion was granted by the Honorable Potter Stewart, and an Order was filed and entered in the within case in this Court on April 2, 1965, extending the time to and including May 10, 1965.

On April 7, 1965, counsel for the Petitioner filed in the United States Court of Appeals for the Sixth Circuit, a second "Motion To Stay Issuance Of Mandate An Additional Period Of Time, Pending The Filing Of, And The Ruling On A Petition For Rehearing On The Order Of The Supreme Court Denying The Petition For Writ Of Certiorari". The said Motion was granted and an Order was filed and entered on April 17, 1965, to stay the Mandate until May 10, 1965, and that the stay shall continue until the final disposition of the case by the Supreme Court.

JURISDICTION OF THIS COURT

The statutory provision believed to confer upon this Court jurisdiction to review the decree in question by writ of certiorari is invoked under 28 United States Code, Section 1254(1), Rule 19 of the Rules of the Supreme Court of the United States, and under the Fourteenth Amendment to the Constitution of the United States.

This Petition for Rehearing is filed pursuant to Rule 58 of the Rules of the Supreme Court of the United States.

The grounds upon which it is based are that there are other substantial grounds set forth herein available to the Petitioner which were not previously presented.

STATEMENT OF FACTS

At the time this Court's Order was filed and entered on March 15, 1965, denying the Petition for Writ of Certiorari, counsel for the Petitioner Patricia R. Smith, had been unable to file a Reply Brief to the Brief filed on February 15, 1965, for the Respondents, The Louisville Trust Company and the Citizens Fidelity Bank and Trust Company, due to the fact that on February 18, 1965, counsel for the Petitioner underwent an operation for a cancer on his neck, and there followed a series of X-Ray treatments, and he was incapacitated for some six weeks, and due to the strain and worry from sudden realization that there may be complications or additional operations, counsel for the Petitioner could not, and did not file a Reply Brief, to the Brief filed for the Respondents herein. The failure to so do naturally minimized (or hurt) the cause of the Petitioner. For that reason this Petition For Rehearing has to contain, or will be somewhat longer than the average Petition For Rehearing filed in this Court.

1.

Denial of Due Process of Law

Petitioner Patricia R. Smith, has been denied due process of law in that she is being required to pay seventy-three thousand seven hundred fifty-six dollars and ninety-eight cents ($73,756.98) for administrators' and attorneys' fees

for their purported representation of the estate of John A. O'Brien, deceased, without a trial of this case, without her day in court, and without any jurisdictional determination as to the merits of these claims against her. Further, Mrs. Smith was denied the right to have a trial on the issues raised by her Answer and Counterclaim, and to surcharge the Joint Administrators' purported final settlements of their accounts of the Estate of John A. O'Brien, and she was denied the right to surcharge the Joint administrators for interest on cash due her which was held by them, for losses resulting from maladministration, misrepresentation, negligence and fraud in their administering the O'Brien estate. It was necessary in the Petition for Writ of Certiorari to outline in detail the maladministration by the two Trust Companies of the O'Brien estate, and wherein in the Petitioner's original Counterclaim filed with her original Answer on November 12, 1956, in this case, she sought damages for the Trust Companies' breaches of duty and trust as Joint administrators, in forcing her to consent to the sale of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, that her consent was obtained by duress, and that she has been damaged by the duress practiced upon her. Some of the acts constituting the duress were alleged to be the Joint administrators' willful withholding of principal and income of the estate, initiation of unnecessary and expensive litigation, exhausting the defendant Mrs. Smith, financially, and threatened additional unfair and oppressive expense of litigation and withholding of the estate, bringing the defendant Mrs. Smith to a point of discouragement and despair, and fear of loss of her estate, so that she was not in a position to contract freely or negotiate a fair sale of her partnership interest. Because of the volume of the pleadings, the basic constitutional issue may have been submerged. The facts in this regard are relatively simple.

The complainant Trust Companies would have this court believe this is a cause of action under KRS 396.140 to recover an overpayment to Petitioner from the estate of John

A. O'Brien, deceased, of which complainant Trust Companies are Joint administrators. Instead of simply pleading this, the Joint administrators in their complaint filed against Mrs. Smith on September 13, 1956, set forth what they contended were the facts pertaining to the negotiations for the sale of the partnership interest, and the value of the interest owned by Mrs. O'Brien-Smith in the partnership of the tobacco company of Edward J. O'Brien & Company and its four subsidiaries, and a complete history of their handling and representing the O'Brien estate for over 22 years from 1934 to 1956.

The within suit is a settlement suit and is the third settlement suit filed in the Jefferson Circuit Court by the Joint administrators to settle their accounts of the Estate of John A. O'Brien, wherein the Joint administrators were trying to obtain court approval for their sale of Mrs. Smith's partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, and for the Circuit Court's approval of their administration of the estate, after having failed and refused for the third time to draw their complaint to comply with the requirements of Section 429 of the Civil Code of Practice of Kentucky, in order to get the approval of the Jefferson Circuit Court. This refusal has continued despite two other lawsuits filed in the O'Brien Estate and against Mrs. Smith by the Joint administrators in Kentucky Courts, covering a period of twenty-eight years, all of which were won by Mrs. O'Brien-Smith.

From July 1951, through January 1952, the Joint administrators held *ex parte* hearings in the O'Brien Estate in Jefferson County Court, which entered a Judgment on March 5, 1952, and an Amended Judgment on May 1, 1952. No exceptions were filed by Mrs. O'Brien-Smith, to the so-called Judgment or Amended Judgment of March 5 and May 1, 1952, filed and entered in County Court, and she was not present in person, or by counsel at any of the proceedings had by the Joint administrators in the County Court. She was then attempting to effect the restoration of the Records of the O'Brien Estate, which had been lost

or stolen because the Joint administrators had refused to legally restore the records. (See the case of *Smith* v. *Louisville Trust Company and Citizens Fidelity Bank & Trust Company,* 262 S.W. 2d 479, November 20, 1953).

Since no exceptions of any kind were filed by Mrs. O'Brien-Smith to any of the claims or items confirmed in the report, or the supplemental report of the County Court Commissioner, and the award and approval by the County Judge of the Commissioner's report in the so-called judgments of March 5, 1952, and amended on May 1, 1952, when the report was approved and recorded, *it simply became a ministerial act,* and the settlement so made and recorded became *prima facie* evidence between the parties interested and under the laws of Kentucky the claims and items of the said purported final settlement of the accounts of the Joint administrators were subject to be surcharged and falsified within 5 years from the day the so-called judgment was filed and entered, approving the County Court Commissioner's Reports.

We are supported in the above contentions by the following cases found in the Annotations from the Statutes of Kentucky, from the year of 1873 to the Kentucky Revised Statutes of today, which holds as follows:

> "1. The confirmation of a settlement is a ministerial rather than judicial act. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 510-515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."
>
> "2. A confirmation of a settlement is only prima facie evidence, and may be questioned on its merits by a bill in chancery. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."
>
> "3. Persons who do not file written exceptions or contest in the county court the validity of charges complained of, may have the alleged errors reviewed by a bill in chancery. *Scott's Heirs* v. *Kennedy's Ex'r,* 12 B. Mon. 515; *Turley's Adm'r.* v. *Barnes,* 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."
>
> "4. A settlement is not conclusive, either on the parties or on the Court making it. *It is not conclusive*

in any other court, but is only prima facie evidence, subject to be surcharged and falsified. Turley's Adm'r v. *Barnes*, 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."

"5. A verbal objection at the time of settlement is not equivalent to the filing of formal written objections. *Turley's Adm'r* v. *Barnes*, 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."

"6. A formal entry of the order of confirmation of the settlement, in the absence of exceptions, is not a final judgment from which appeal can be taken. *Turley's Adm'r* v. *Barnes*, 103 Ky. 127, 44 S.W. 446; XIX K.L.R. 1808."

Mrs. O'Brien-Smith endeavored to surcharge and falsify the purported final settlement of the accounts of the Joint administrators of the O'Brien Estate, by the filing of a Motion For Leave To File Her First Amended Answer and First Amended Counterclaim, with the exhibits "A" to "G", which were tendered therewith on February 23, 1957, in the within case, in the office of the Clerk of the District Court. (A. "B", pp. 165a-330a.) Exhibits D, E and F, were copies of certified copies of the Joint administrators' receipts and disbursements filed with their three purported final settlements of their accounts of the O'Brien Estate in County Court on June 21, 1950, January 7, 1952, and on August 7, 1952, yet the District Court overruled Mrs. Smith's Motion For Leave To File *The Receipts and Disbursements, which the Joint administrators failed to file with their Complaint in the Jefferson Circuit Court for the final settlement of their accounts of the O'Brien Estate.* The said Motion was denied by the District Court, which was upheld by the Court of Appeals.

The District Court, on the basis that it lacked probate jurisdiction, refused a trial of the issues raised by Mrs.

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[1] The Petitioner filed with her Petition For Writ of Certiorari, a complet and correct copy of the entire Transcript of Record in the above-entitled case from the District Court, and the United States Court of Appeals for the Sixth Circuit, which was all printed in three Volumes, and a complete and correct copy of the Kentucky statutory provisions involved, Fourteenth Amendment, Federal

Smith in her first answer, which denied and controverted the allegations of the complaint in more than 21 numbered paragraphs, and she denied all other affirmative allegations made by the Joint administrators in their complaint, (A. "B", pp. 121a-139a), and by Mrs. Smith's first amended answer, and first amended counterclaim, (A. "B", 164a-330a; A. "C", pp. 1703a-1989a), but the District Court accepted the settlement and the Commissioner's report which was recorded only as *prima facie* evidence in the O'Brien Estate, and the so-called judgment of the County Court confirming the report, called it a final judgment, and gave a summary judgment against Mrs. O'Brien-Smith for seventy-three thousand seven hundred fifty-six dollars and ninety-eight cents ($73,756.98), in direct violation of the statutes and laws of Kentucky, governing the final settlement of the accounts of administrators of estates in Kentucky, which is clearly set out herein.

The District Court and the Court of Appeals completely missed the point when they called the confirmation of the purported final settlement of accounts, a final judgment in the County (Probate) Court. Thus causing a grevious error and a flagrant miscarriage of justice in this case.

Do not let the statute in Kentucky regulating the probate of a will, be confused with the administration of estates in Kentucky.

Rules of Civil Procedure, the four cases she won against the Joint administrators in the Kentucky Court of Appeals, and four Kentucky cases governing the final settlement of the accounts of an administrator in Kentucky, in one Volume marked Appendix A, which consists of fifty-six and one-half printed pages; Appendix B is Volume I of the printed Transcript of Record consisting of pages 1a through 1279a; Appendix C is Volume II of the printed Transcript of Record consisting of pages 1280a through 2175a; Appendix D is Volume III of the printed Transcript of Record consisting of pages 2175a through 2625a, all four Volumes were clearly stamped on the front of each that they were an Appendix to Petitioner's Writ of Certiorari filed on January 16, 1965, and each Volume had the signature of her counsel Walter B. Smith on the last page thereof.

Our research does not reveal that any of the other forty-nine (49) states have probate proceedings similar to the ones practiced under Kentucky law, wherein an accounting can be filed in County (Probate) Court as a final settlement and if no exceptions are filed as provided under Kentucky law and KRS 25.200, the filing of said settlement is a ministerial act, unless within five years an interested party may file a suit in equity in the Circuit Court to surcharge and falsify any one, or all of the claims and items in the settlement of accounts or final settlement of the estate in question. So the filing of a final settlement is never a final judgment in Kentucky, future litigation in any estate is only tolled by the statute of limitations KRS 413.120(12) (KS 2515; 2518) at the end of five years.

A judgment is not final where it is impossible for the party in whose favor the decision is rendered, cannot enforce by execution what has been adjudged.

If the so-called Judgment of March 5, 1952, and the Amended Judgment of May 1, 1952, had been final Judgments, Why Did the Joint Administrators Fail To Levy And Enforce By Execution The Aforesaid Judgments In The County Court?

Just why did the Joint administrators file another settlement suit the within suit, instead of enforcing the purported "final" Judgments rendered March 5, 1952, and May 1, 1952, in County (Probate) Court? Frankly, the answer is that these so-called final Judgments were ministerial acts in the County (Probate) Court proceedings under Kentucky law, and Kentucky statutes, and specifically under KRS 25.200 which states that settlements "made and recorded shall be prima facie evidence between the parties interested".

County (Probate) Courts in Kentucky never have had, nor do they now have jurisdiction of the res. *In fact, the qualifications for the County (Probate) Judges are simple, the Judge must be twenty-five years of age and a voter.* Yes, there is one other pre-requisite. He must be elected,

and as such County (Probate) Judge he has no jurisdiction to enter a final judgment.

If the District Court and the Court of Appeals for the Sixth Circuit did not have jurisdiction over a Probate Matter to decide every issue and question involved in this case, then they did not have a jurisdictional right to rule that the issue of the sale of Mrs. Smith's partnership interest in the Edward J. O'Brien and Co. and its four subsidiaries was barred by the rule or res judicata that the joint administrators and their attorneys should be awarded $73,756.98 for fees from Mrs. Smith and that the joint administrators can retain the $40,000.00 cash belonging to Mrs. Smith, without paying her $84,000.00 compounded interest due her for their retaining cash over a period of 29 years.

If the District Court lacked probate jurisdiction to try this case on the issues raised by Mrs. Smith's original Answer and her original Counterclaim in which she denied and controverted the allegations of the Complaint, and all their affirmative allegations made by the Joint administrators in their Complaint, and by Mrs. Smith's First Amended Answer and First Amended Counterclaim and her Second Amended Answer and her Second Amended Counterclaim tendered, (there is much precedent to the contrary—see *Griffith* v. *Bank of New York*, 147 F. 2d 899 (1945); *Paul, et al.* v. *Girard Trust Company*, 124 F. 2d 809 (1941); *Rogers* v. *Girard Trust Company*, 159 F. 2d 239 (1947); and the ruling of this Court in the case of *W. J. Meredith, et al.* v. *City of Winter Haven*, 320 U.S. 228 (1943), then the District Court also lacked probate jurisdiction to accept the settlement of accounts of the Joint administrators and the County Court Commissioner's report and the judgment of the County Court confirming the Commissioner's reports as a final judgment. As the reference cases note, supra, the decision of the Sixth Circuit Court of Appeals, in the within case, is in conflict with decisions of two other Circuit Courts of Appeal, and it is in conflict with the Sixth Circuits own ruling in the case

of *Rogers* v. *Girard Trust Company*, 159 F. 2d p. 239, and it is in conflict with this Court's ruling in the case of *Meredith* v. *City of Winter Haven*, 320 U.S. 228, (1943), and under Rule 19 of the Supreme Court of the United States a writ of certiorari should issue.

2.

The District Court Denied Mrs. Smith the Right of a Trial to Prove That the Two Trust Companies Owe Her More Than $84,631.95 Interest on Cash Now Held By Them, Belonging to Her

The Joint administrators already owe to the O'Brien Estate, of which Mrs. Smith is the sole beneficiary, more than the amount of the summary judgments, by virtue of Kentucky law, and Kentucky statutes. KRS 395.310 states and holds that:

> "A personal representative, after the expiration of two years from the time he qualifies, shall be charged with interest on the surplus assets in his hands from that period, and before the expiration of two years shall be charged with all interest realized on assets."

(1) The Joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $25,000.00 cash belonging to Mrs. Smith which they held in their banks from February 11, 1936, to June 28, 1946, which amounts to ..... $20,779.38.

(2) The Joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $40,000.00 cash belonging to Mrs. Smith which they held in their banks from June 28, 1946 to November 9, 1962, which amounts to $63,852.57
cash, which they still have in their possession as well as the cash in the amount of $40,000.00. The interest alone to November 9, 1962, amounts to ..... $84,631.95.

When the District Court denied Mrs. Smith the right of a trial in this suit filed by the Joint administrators against

her, to settle their accounts of the O'Brien Estate, she was denied the right to introduce proof, on the interest due her from the Joint administrators, and other proof of what the Joint administrators owe her.

3.

The Joint Administrators and Their Attorneys are Not Legally Entitled to Any Interest on the Fees Claimed

In contrast, the Joint administrators and their attorneys were allowed interest on the fees awarded to them by the District Court, and the Court of Appeals, which under Kentucky law they are not legally entitled to interest on their fees, even if this was an overpayment suit, which it is not. (See the case of *Reder and Others, Heirs of Hill, against Hill's Executor and other Heirs*, (1837) 5 Dana (35) 37, 147 Ky. 323, 144 S.W. 20 which held:

> "Seventh. It was erroneous to decree interest upon the balances found to be due from the complaints to the executor, for over payments. They grow principally, if not entirely, out of the allowances made to the executor, for personal services &c. on which he is not entitled to interest. Their existence, as well as amount, was dependent upon the final settlement before the Chancellor. And the over payments, if they may be so called, were made by the executor in his own wrong."

In addition to the above two Kentucky statutes, the Joint administrators have violated more than eight other Kentucky statutes governing the administration of, and the final settlement of their accounts of the O'Brien Estate, which was approved by the District Court and upheld by the Court of Appeals, which is fully set out herein; and the Joint administrators have not yet filed a final settlement of their accounts of the O'Brien Estate, and as long as they hold cash in their possession belonging to the said Estate, and to Mrs. Smith, the said settlement cannot be a final settlement under the Kentucky Revised Statutes, and the Kentucky law, and the awarding of the administra-

tors and attorneys fees are premature, even if any fees are due at all.

When Mrs. Smith was denied the right of a trial in this case, she was denied the right to introduce the proof that the Joint administrators are not entitled to any fees at all, and that their attorneys are not entitled to any additional fees, when they have already been paid twenty-five thousand ($25,000.00) dollars, before they started filing their three lawsuits in the O'Brien Estate, the first one being filed in 1937.

In the statement of the case in the Petitioner's petition for *certiorari* it was necessary to set forth some of the background of this case, covering a period of some twenty two (22) years, in order to show wherein the Joint Administrators of the Estate of John A. O'Brien have continuously breached their fiduciary duties imposed upon them by the Statutes and laws of Kentucky, governing the final settlement of an estate, and in failing and refusing to file a final settlement of the O'Brien Estate on March 1, 1936, in the Jefferson County Court, and for a further period covering nineteen years, even after the Court of Appeals of Kentucky had ordered and directed them to, in three separate opinions rendered in 1948, 1950, 1951, in the Joint administrators first two settlement suits, filed by the Joint administrators in the O'Brien Estate in the Jefferson Circuit Court, and in a fourth opinion from the Court of Appeals of Kentucky rendered in 1953 against the Joint administrators, in **the Joint administrators Appeal from the Rule Issued against them, and the Order thereon, by Judge Horace M. Barker, Judge of the Jefferson County Court, in 1949**, to file a final settlement of the O'Brien Estate by June 1, 1949, in which the Joint administrators filed an Appeal on May 26, 1949, to the Jefferson Circuit Court. The Joint administrators then had a supersedeas issued and served on Judge Horace M. Barker, Judge of the Jefferson County Court, on June 2, 1949, to stay all proceedings in the final settlement of the O'Brien Estate in

County Court. After that appeal was filed by the Joint administrators, they took all of the original Records in the Estate of John A. O'Brien, from the County Court and filed them with their appeal in the Jefferson Circuit Court, the original Records were never seen again or recovered. They were lost or stolen and it took four years of litigation, an opinion from the Court of Appeals of Kentucky on November 20, 1953, and an order thereon from the Jefferson Circuit Court, to compel the Joint administrators to restore the lost or stolen records, legally as required by Kentucky law to wit until October 1954. (See Petitioner's Exhibit No. 32, in the printed Transcript of Record Appendix "B", pages 713a to and including page 932a, and Petitioner's printed **Appendix "A", pages 15-36, for complete and correct copy of the four opinions of the Court of Appeals of Kentucky in lawsuits and appeals which were filed and prosecuted by the Joint administrators, and won by Mrs. Smith, namely:**

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 308 Ky. 189; 213 S.W. (2d) 987 (June 8, 1948), Rehearing denied Oct. 29, 1948. (A. "A", pp. 15-26).

The Louisville Trust Co. and Citizens Fidelity Bank and Trust Co. v. *Smith*, 313 Ky. 15, 230 S.W. (2d) 64 (May 16, 1950). (A. "A", pp. 27-29).

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 237 S.W. (2d) 836 (March 6, 1951) Rehearing denied April 17, 1951 (in which Mrs. Smith was granted a permanent injunction against the Joint administrators). (A. "A", pp. 29-32).

Smith v. *The Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479 (November 20, 1953). (A. "A", pp. 32-36).

The lawsuits filed and prosecuted by the Joint administrators and their appeals filed therein, included thousands of pages of testimony and briefs; they were unnecessary, expensive, incessant harrassing litigation; they were not for

the benefit of the O'Brien Estate, but for the benefit of the two Trust Companies.

The reason that the Joint administrators failed and refused to meet the requirements of Sections 428 and 429 of the Civil Code of Practice of Kentucky in their allegations in the two Petitions drawn and filed in their First Settlement Suit of the O'Brien Estate in the Jefferson Circuit Court, and after the first opinion was rendered therein they filed an Amended Petition therein, and the Petition drawn which they filed in their Second Settlement Suit of the Estate was because the Joint administrators did not want to state or reveal "**the nature and value of the property, real and personal, of the decedent's (John A. O'Brien's) Estate, so far as known to the Plaintiff,**" (Trust Companies) as is required by Section 429 of the Civil Code of Practice of Kentucky. (See the three Opinions, supra, also see A. "A", pp. 15, 19, 20, 21, 25, 26, 27, 28, 29, 31, 32), and to this day the Joint administrators have not revealed the nature and value of the property, real and personal of the decedent John A. O'Brien's Estate, and **THAT IS WHY THEY HAVE LABELED THE WITHIN SUIT "THEIR OVERPAYMENT SUIT"**, which does not comply with the requirements of KRS 396.140 just the same as their three petitions in their first two settlement suits failed to meet the requirements of Section 429 of the Civil Code of Practice of Kentucky as so held by the Court of Appeals of Kentucky in three opinions against the two Trust Companies, supra.

It is for that kind of illegal representation by the two Trust Companies and their attorneys for which they have been awarded on the Summary Judgments in the within case additional fees of $73,756.98, in addition to the $25,000.00 the attorneys have already been paid from the O'Brien Estate by the Summary Judgments of the District Court, and the Court of Appeals for the Sixth Circuit, in violation of the statutes and laws of Kentucky in the final settlement of estates in which Mrs. Smith was denied the right of a trial thereon.

4.

Nature of Suit.

This suit filed by the two Trust Companies the Respondents, on September 13, 1956, is not a statutory suit under KRS 396.140, to recover from Petitioner Mrs. Smith for an overpayment (or over-distribution) to her, as a distributee of the estate of her former husband, John A. O'Brien; it is a third settlement suit of the O'Brien Estate, for the sole purpose of getting the approval of the Court for the sale of Mrs. Smith's partnership interest in the E. J. O'Brien & Company and its four subsidiaries, by the Joint administrators, and the Court's approval of the Joint administrators handling and administration of the O'Brien Estate which they have illegally withheld since March 1, 1936, in violation of KRS 25.175, (A. "A", pp. 4-5), and to get additional attorneys fees of fifty thousand ($50,000.00) dollars, in violation of their written agreements in addition to the twenty five thousand dollars ($25,000.00), which they have already been paid from the O'Brien Estate, and to get twenty three thousand seven hundred fifty six dollars and ninety-eight cents ($23,756.98) fees for the two Trust Companies, which violates their contract for fourteen thousand ($14,000.00) dollars, which **the District Court and the Court of Appeals for the Sixth Circuit, awarded to the Joint administrators on a County Court Judge's administrative award, a total of $73,756.98, which is over 22.8% of the total amount which the Joint administrators received for the sale of Mrs. Smith's partnership interest, and the stocks and securities Mrs. Smith inherited from her husband John A. O'Brien.** The $200,000.00 life insurance under which Mrs. O'Brien-Smith was the sole beneficiary, was not a part of the Estate, did not come under the administration of the Estate, by the Joint administrators, and they had no legal right to mix it up with the Estate, or in their sale of the partnership interest owned by Mrs. O'Brien-Smith, to James G. O'Brien, brother of John A. O'Brien. (A. "C", Exhibits No. 55, 56, 57, 59, 60, pp. 1927a-1940a).

The reason the Joint administrators call this suit their "overpayment suit" is because the Court of Appeals of

Kentucky in the Joint administrators' Second Trumped-up Settlement Suit of the O'Brien Estate, granted to Mrs. Smith a permanent injunction against the Joint administrators, enjoining the Joint administrators from prosecuting their Second Settlement Suit of the O'Brien Estate, and from ever filing a third settlement suit of the Estate, supra. (A. "A", pp. 29-32).

The petition or complaint filed by the Joint administrators in this suit, does not comply with KRS 396.140; it fails to comply, just the same as their two petitions in their first two settlement suits, and their amended petitions therein, as held by the three opinions of the Court of Appeals of Kentucky, supra. (A. "A", pp. 15-32).

The petition in this case was not framed under that statute in its simplicity as it should have been because, under KRS 396.140, the petition should have said: "We the Trust Companies are the Plaintiffs, Mrs. Patricia R. Smith is the Defendant. We have paid so much over and above the amount that she was entitled to, we ask for judgment.'

Instead of saying that, the Joint administrators stated in their petition or complaint filed on September 13, 1956, (consisting of 28 pages and their Exhibit 1, thereto consisting of 39 pages), what they set out and contended were the facts pertaining to the value of, and the history of the negotiations for the sale of the partnership interest owned by Mrs. O'Brien-Smith in the partnership of the tobacco company of Edward J. O'Brien and Company and its four subsidiaries, and a complete history of their handling and representing the O'Brien Estate for over twenty-two (22) years from 1934, to 1956, which Mrs. Smith had a legal right to answer and controvert, and to have a trial on the issues which she was denied by the District Court which was upheld by the Court of Appeals.

Now the Defendant-Petitioner Mrs. Smith, in her original Answer filed in this case on November 12, 1956, denied and controverted the allegations in the Complaint, (A. "B",

pp. 121a-134a) and filed a counterclaim with her original Answer, (A. "B", pp. 134a-139a). On February 23, 1957, she filed a Motion for leave to file an amended answer and an amended counterclaim, with Exhibits A to G, which were tendered therewith, (A. "B", pp. 164a-330a). In the first amended answer and amended counterclaim which was tendered before the five year period expired from March 5, 1952, wherein she sought to surcharge and falsify the purported final settlement of the accounts of the Estate, there were over eighty (80) exceptions to items and disbursements made by the Joint administrators in the administration of the O'Brien Estate. On May 15, 1961, Mrs. Smith filed a Motion for leave to file a Second Amended Answer and Second Amended Counterclaim, with Exhibits 42 to 75, which were tendered therewith, but both Motions were denied by the District Court, and upheld by the Court of Appeals for the Sixth Circuit. (A. "C", pp. 1703a-1989a).

5.

There Were Not Any O'Brien Family Controversies.

The Petitioner Mrs. Smith did not see any member of the O'Brien family after the funeral of Mr. O'Brien, and she did not have any controversies with any of the O'Brien family after the death of Mr. O'Brien, and all that she knew about any contentions that any member of the O'Brien family were making were told to her by the Joint administrators and their attorneys, in regard to her interest in the partnership in the E. J. O'Brien and Co., and the life insurance on the life of John A. O'Brien, and his security holdings. There is no proof in the record of the within case to substantiate the Respondents' contentions. Mrs. Smith is fully upheld in her statements in regards to the Joint administrators failure to disclose the true value of the partnership interest, the misrepresentations, threats, coercion and undue influence exerted upon her as alleged in her Answer and Counterclaim filed herein, by the Deposition of Edward C. Wirotzious a government employee,

(see Defendant-Petitioner's Exhibit No. 35, Printed Transcript of Record, A. "B", pp. 1230a-1277a).

THERE WAS NOT ANY TRANSCRIPT OF TESTIMONY OF ANY HEARINGS OR PROCEEDINGS OF ANY KIND OR DESCRIPTION FILED IN THE WITHIN CASE, either from the Rescission Suit filed and lost by Mrs. Smith, or the two Trumped-up Settlement Suits of the O'Brien Estate filed and lost by the Joint administrators in the Courts of Kentucky, and **there was not any Transcript of Testimony filed in the within case from the hearings and proceedings had in the Jefferson County Court by the Joint administrators, as the Docket Entries which were printed from Certified authenticated copies in the three volumes of the printed Transcript of Record clearly show, which were filed in the within case, in this Court, on January 16, 1965, by counsel for Mrs. Smith,** which **the Joint administrators admit are true and correct,** and have made many references thereto in their briefs in the Court of Appeals for the Sixth Circuit, and in this Court, a printed copy of each volume was served on them which they have in their possession.

It was the Joint administrators, and not Mrs. Smith who sold her partnership interest in E. J. O'Brien & Company and its four subsidiaries for three hundred eighty thousand ($380,000.00) dollars on November 5-15, 1935.

The Court of Appeals of Kentucky in the Rescission Suit, which was against only the brothers of John A. O'Brien held that Mrs. O'Brien, (now Smith) "was the sole beneficiary of the last will and of the Estate of John A. O'Brien." Thus, she was the sole beneficiary of his security holdings, and that "she was the sole beneficiary of Mr. OBrien's $200,000.00 life insurance," because she was the only beneficiary named in the policies, "there was no insurance trust agreement making anyone else a beneficiary endorsed on the policies." (A. "C", Exhibit 52, Vol. II, p. 1896a). (A. "B", see copies of insurance policies Defendant-Petitioner's Exhibits No. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, pp. 503a-635a), filed with Mrs. Smith's Pleading entitled,

> **"DEFENDANT'S SUPPLEMENTAL AFFIDAVIT OF PATRICIA O'BRIEN-SMITH IN OPPOSITION TO 'PLAINTIFFS' JOINT ADMINISTRATORS' MOTION FOR A SUMMARY JUDGMENT'** and (Mrs. Smith's) 'Second Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim, Filed Herein on November 12, 1956', Tendered on August 27, 1959, with Thirty-five (35) Exhibits attached thereto, *Filed Pursuant to Order Dated August 28, 1959.*" (*Transcript of Record*, A. "B", pp. 472a-1279a).

Thus, the Joint administrators and their attorneys who were also Mrs. O'Brien-Smith's attorneys, gave Mrs. Smith false advice, when they told her that they were selling her partnership interest three years before the partnership agreement provided it could be sold, because the claims which they contended were being made by the O'Brien family, were legitimate claims, when in truth and fact by the Court of Appeals of Kentucky's ruling in favor of Mrs. Smith in the Rescission Suit, they were only bogus claims, and should not have been given any consideration.

6.

The Ruling By The Court of Appeals For the Sixth Circuit and the Ruling By the District Court (Judge Kent) In This Case, That the Claims of Fraud Against the Joint Administrators Set Forth In Mrs. Smith's Original Counterclaim, Are Barred By the Rule of Res Judicata, Is In Conflict With the Decision of the District Court (Judge E. B. Freed) On the Same Issue, And Against the Same Two Trust Companies.

The only lawsuit which was ever filed by Mrs. O'Brien-Smith against the Respondent Trust Companies the Joint administrators, and it was dismissed by her without prejudice, there was no testimony given, it never went to trial, and it was styled:

> "In the United States District Court for the Western District of Kentucky at Louisville, No. 870, Patricia R. Smith v. The Louisville Trust Company and the Citizens Fidelity Bank & Trust Company, filed on March 16, 1945, which was dismissed without prejudice by Mrs. Smith on March 10, 1949."

In that case Judge E. B. Freed, Federal District Judge of Cleveland, Ohio, who was sitting by designation in that case, **after reading the entire Rescission Suit Record, and the "2,000 pages of evidence in the case," of (O'Brien v. O'Brien, 294 Ky. 793; Cert. Den. 321 U.S. 767; reh. den. 322 U.S. 769)**, which was against only the brothers of John A. O'Brien which Mrs. O'Brien-Smith lost, **and after reading the entire orinted Transcript of Record in the Joint administrators' first trumped-up settlement suit of the O'Brien Estate, consisting of eight hundred ninety-two (892) printed pages, (which they lost, and it was won by Mrs. Smith)**, Judge Freed ruled that,

> "the issue of fraud against the Joint administrators in making the sale of Mrs. O'Brien-Smith's partnership interest, WAS NOT (AND IS NOT) BARRED BY THE RULE OF RES JUDICATA, BY THE JUDGMENT OF MAY 23, 1940, IN HER RESCISSION SUIT,"

in the case of *O'Brien* v. *O'Brien*, *supra*, and entered an order overruling the Joint administrators' Motion for Summary Judgment in that case, (which should have been done in the within case) and rendered an opinion and filed and entered an order, which are as follows:

"In The
District Court of the United States
For the Western District of Kentucky
Louisville Division

"Civil Action No. 870

Patricia R. Smith, *Plaintiff*.

vs.

The Louisville Trust Company, a corporation and, Citizens Fidelity Bank & Trust Company, a corporation, *Defendants*.

ORDER

"This matter came on for hearing on the motion of the defendants, the Louisville Trust Company and

Citizens Fidelity Bank and Trust Company, for a summary judgment under favor of Rule 56 of the Rules of Civil Procedure, the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment be and is hereby overruled.

/s/ E. B. FREED"
United States District Judge"

November 7, 1947"

"In The
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
Louisville Division

"Civil Action No. 870

PATRICIA R. SMITH, *Plaintiff*,

vs.

THE LOUISVILLE TRUST COMPANY, a corporation and, CITIZENS FIDELITY BANK & TRUST COMPANY, a corporation, *Defendants*.

MEMORANDUM RE MOTION FOR SUMMARY JUDGMENT

"FREED, J.:

"Defendants' motion for summary judgment is predicated on the contention that two prior actions in the State Courts of Kentucky prohibit a right of recovery by the Plaintiff in this Court. The prior actions were referred to in the Defendants' answer, in the respective briefs of the parties and arguments of counsel as the 'Rescission Suit' and 'Settlement suit'.

"The record in the Settlement suit clearly discloses that the Court refused to adjudicate the precise claim of Plaintiff urged in this action. It refused to receive any evidence in support of the charge of negligence by the Defendant corporations in handling the estate of John O'Brien. Such ruling by that Court in the Settlement suit cannot conceivably result in a bar to the instant controversy.

"Whether the judgment in the (case of) *O'Brien* vs. *O'Brien*, (294 Ky. 793); (172 S.W. 2d 595); (Cert. Den. U.S. 767; reh. den. 322 U.S. 769); the Rescission Suit, is res judicata as to this action or constitutes an estoppel by judgment must be determined by the Law of Kentucky. *Oklahoma Packing C.* v. *Oklahoma Gas & Electric Co.*, (309 U.S. 4); *In re Potts 6 Cir.*, (142 F. (2d) 883); *Waybright* v. *Columbian Mutual Life Insurance Co., 6 Cir.*, (122 F. (2d) 245).

"To render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties to the action and identity of quality in the persons or parties for whom or against whom the claim is made. *Swift Coal and Timer Co.* v. *Cornett*, (249 Ky. 760); *Ralph Wolff & Sons* v. *New Zealand Insurance Co.*, (248 Ky. 304).

"In the case of *Prewitt* v. *Wilborn*, (184 Ky. 638); (212 S.W. 442), the Court of Appeals clearly pointed out the distinction between the doctrine of res judicata and estoppel by judgment as follows:

> 'A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties, upon the same cause of action, and a second suit between the same parties upon a different cause of action. In the first instance, the judgment is a complete bar to the second action, not only as to everything which was used in the first action to sustain or defeat the demand, but, everything, which the parties could have used properly for that purpose; but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estoppel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision and is not conclusive as to matters not decided, and the decision of which was not essential to the decision in the first suit, although issues may have been made in reference to them.'

"It is readily discernible from the examination of the Rescission suit and this action, that there is lacking

the identity of the quality of the parties necessary to bring the Rescission suit within the ambit of the doctrine of res judicata or estoppel by judgment. The principles of law laid down by the Kentucky courts applied to the causes of action in issue leads the court to the conclusion that the motion for summary judgment must be overruled.

/s/ E. B. FREED"
United States District Judge"

November 6, 1947"

Thus, we have a conflict of decisions of two District Courts, on the same question of *res judicata* and against the same two Trust Companies.

The Case of O'Brien v. O'Brien, 294 Ky. 793; Cert. Den. 321 U.S. 767; The Rescission Suit Was Not Adequately Before The Supreme Court For A Consideration of A Decision, and Mrs. Smith's Original Counterclaim Is Not Barred By the Rule of Res Judicata

In the case of *O'Brien* v. *O'Brien*, 294 Ky. 793; 321 U.S. 767; rehearing denied 322 U.S. 769; that was a suit filed by Mrs. O'Brien-Smith against the brothers of John A. O'Brien, only, for rescission of the sale of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, she lost that suit in the Jefferson Circuit Court and Court of Appeals, but in the opinion of the Court of Appeals of Kentucky, it held (1) "that Mrs. O'Brien-Smith was the sole beneficiary of the will and the Estate of John A. O'Brien"; (2) that the claims asserted on behalf of the brothers of John A. O'Brien under a purported insurance trust agreement on $200,000.00 life insurance, was not legitimate, and that Mrs. O'Brien was the only beneficiary named in the said policies; (3) that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the net sound market value of her partnership interest, but that it was the duty of her counselors and advisors to ascertain the true market value of her partnership interest,

and it named the joint administrators and their attorneys as Mrs. Smith's counselors and advisors. (See Mrs. Smith's Exhibit No. 52, pp. 1896a, A. "C", pp. 1902a, 1908a). That case, the rescission suit, was before the Supreme Court of which three of the questions were as follows:

> "1. That the denial by the trial court of the process of that Court by refusing in all material respects Mrs. Smith's motion for subpoena *duces tecum* resulting in denial to her of access to any single book of original entry of the partnership, or of its subsidiaries; or original document from which to ascertain or prove value, prevented her, in effect, from having her day in Court and amounted to the denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States." (Cases were cited to uphold the contentions.)
>
> "2. That the decision of the State Court being contrary to the admitted and uncontradicted facts and the well-established principles of law amounted to arbitrary deprivation of Mrs. Smith's property without due process of law and without a real hearing as contemplated under the Fourteenth Amendment to the Constitution of the United States." (Cases were cited.)
>
> "3. That where the Court found facts substantially correct and recognized correct rule of law applicable thereto, but failed altogether without reason to apply such rule of law to such facts as a result thereof there was unjust enrichment of trustee of expense of *cestui que trust*, such action amounts not simply to error, but there is a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States."

It was contended in the rescission suit, on behalf of Mrs. Smith that the denial by the trial Court (Jefferson Circuit Court) in the rescission suit of Mrs. Smith's motion for subpoena *duces tecum* in all material respects prevented her from proving one of the necessary elements of fraud and deceit. To show the true net sound market value of her partnership interest in the Edward J. O'Brien & Company and its four subsidiaries, and thereby the falsity of the representations made to her, was absolutely necessary in

order for Mrs. Smith to make out her case. That if the Court afforded her its process and gave her a full hearing on all other elements necessary in order to make out a case of fraud and deceit for the rescission of the contract of sale and yet denied her the process of the Court by subpoena *duces tecum*, or otherwise, and denied her an opportunity to be heard at all upon this one necessary element of her cause of action, then she has, in effect, had no hearing at all.

In the rescission suit which was against only the brothers of John A. O'Brien in the trial of that case, Mrs. Smith was denied the right to see or inspect any original books of the Edward J. O'Brien & Company or its four subsidiaries, and was denied the right to have an audit made to determine the net sound market value of her interest in the said companies. No partial audit was ever made for her, either before, or in the rescission suit or since the rescission suit was filed and lost.

In the argument in the brief filed in this Court in the rescission suit, was that to constitute a hearing which satisfies due process it must be a real one and not a sham or pretense. (Cases were cited.) To satisfy due process a hearing must be a fair one, according the litigant an actual opportunity to present evidence in support of his contentions. (Cases were cited.)

To condemn without a hearing or to depart from established modes of procedure offends due process. (Cases were cited.)

In the brief filed in the case of *O'Brien* v. *O'Brien*, *supra*, in the Supreme Court in the rescission suit, (which was against only the brothers of John A. O'Brien), there were many references made therein to the Transcript of Record in the rescission suit, which included the opinion of the Jefferson Circuit Court therein, and the Court of Appeals of Kentucky, but when a certified copy of the Docket Entries of that case in this Court was obtained several years later, it showed that the Transcript of Record in the

rescission suit from the Kentucky Courts filed in this case in this Court, was never recorded on the Docket Entries of this case in the Clerk's office of this Court, therefore this Court did not see the Record. The number of this case was No. 490. (See Transcript of Record A. "D", Volume III, pp. 2423a-2425a). So, there were no records for this Court to see, to prove or disprove anything as stated in Mrs. Smith's Petition For Writ of Certiorari, in that case quite naturally, the Writ was denied. Even though it was denied, it was held by Judge E. B. Freed, United States District Judge, that the Judgment in the case of *O'Brien* v. *O'Brien*, *supra*, the rescission suit is not res judicata as to an action against the joint administrators for fraud in their sale of Mrs. Smith's partnership interest in the E. J. O'Brien & Company and its four subsidiaries. (See Writ of Certiorari pages 126a-136a).

7.

Respondent Joint Administrators' Partial Settlement of Their Accounts of Mr. O'Brien's Estate, in Jefferson County Court, Was Not a Final Settlement of the Estate and Three of the Reasons Are Set Out In the Opinion of the Court of Appeals of Kentucky, and Mrs. Smith Did Not Contest, Object To, Or Try To Prevent the Two Trust Companies From Filing A Settlement of the O'Brien Estate In Jefferson County Court.

The partial settlement of Mr. O'Brien's Estate filed in the Jefferson County Court by the Joint administrators on June 21, 1950, was not a final settlement of the Estate and cannot be as long as they retain cash belonging to the Estate and Mrs. Smith and for the many reasons as set forth in Mrs. Smith's Answer and Counterclaim, filed on November 12, 1956, (A. "B", pp. 121a-139a), her First Amended Answer and Amended Counterclaim, tendered with Exhibits "A" to "G", on February 23, 1957, (A. "B", pp. 165a-224a), and her Second Amended Answer and Amended Counterclaim, tendered with Exhibits 42 through 75 on May 15, 1961, (A. "C", pp. 1703a-1989a).

The Petitioner Mrs. Smith did not contest, or object to, or try to prevent the two Trust Companies from filing a

final settlement of the O'Brien Estate in County Court, in 1950, 1951, or any other time, because for over sixteen years she had resorted to every legal means available to force the two Trust Companies to file a final settlement of the O'Brien Estate in the Jefferson County Court, and the two Trust Companies had refused to file it; **they had defied the three rulings and opinions of the Court of Appeals of Kentucky against them, and the rulings of Judge Horace M. Barker, Judge of the Jefferson County Court,** as has already been set out herein.

The purported final settlement of the O'Brien Estate was filed on June 21, 1950; **it was after it was filed, that Mrs. Smith objected to the Joint administrators and their attorneys having expensive and costly hearings, in the Jefferson County Court before a commissioner, on their purported final settlement of the O'Brien Estate, for four main reasons, in which she was fully upheld by the Court of Appeals of Kentucky, (even though the injunction was not granted) in the case of Smith vs. Shamburger, 314 Ky. 850; 238 S.W. 2d 844,** which are:

(1) The Second Trumped-up Settlement Suit of the O'Brien Estate, filed by the Joint administrators on March 31, 1949, No. 313, 655, in the Jefferson Circuit Court, Chancery Branch, Second Division, with Exhibits "A" and "B" annexed thereto, consisting of forty-nine (49) printed pages, was still pending, and had not been disposed of. (See Exhibit 32, A. "B", pp. 881a-929a).

(2) The Injunction Suit filed by Mrs. Smith on April 21, 1949, No. 313,986 in the Jefferson Circuit Court, Chancery Branch, Second Division, to enjoin the Joint administrators from prosecuting their Second Trumped-up Settlement Suit in the O'Brien Estate, filed on March 31, 1949, in the Jefferson Circuit Court, to prevent the two Trust Companies from further wasting the assets of the O'Brien Estate, (which she later won in the Court of Appeals of Kentucky) was still pending, and had not been disposed of. (See Exhibit No. 32, A. "B", pp. 853a-858a), (A. "A", pp. 29-32).

(3) The Appeal filed by the Joint administrators in the Jefferson Circuit Court on May 26, 1949, **from the "Rule Issued" against the Joint administrators and the Order thereon, by Judge Horace M. Barker, Judge of the Jefferson County Court, to file a final settlement of the O'Brien Estate on June 2, 1949, and the injunction and supersedeas issued against Judge Barker in the County Court, by the Joint administrators, issued on May 26, 1949 and executed on June 2, 1949, to stay all proceedings in the County Court in the final settlement of the O'Brien Estate, was still pending,** even though a new Judge had been elected and took office in 1950, (Judge Shamburger). (See Exhibit 32, A. "B", pp. 931a-932a).

(4) All of the Original Records in the Estate of John A. O'Brien were still missing and had not been returned or legally restored, which were taken from the office of the Clerk of the Jefferson County Court to the Jefferson Circuit Court, when the Joint administrators filed their Appeal in the Circuit Court on May 26, 1949, from the Rule Issued against them and the Order thereon by Judge Horace M. Barker, Judge of the County Court, and had a supersedeas issued and served on Judge Barker, to stay all proceedings in the Estate of John A. O'Brien; and the records were not legally restored until October 1954, almost a year after the Court of Appeals ordered and directed the Joint administrators to legally restore the records in the O'Brien Estate. (see *Smith* v. *The Louisville Trust Company and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479; (November 20, 1953), also see A. "A", pp. 32-36).

The Court of Appeals of Kentucky upheld Mrs. Smith a fifth time, in her contentions, even though they overruled her Petition for Writ of Mandamus against Judge Shamburger in the case of *Smith* v. *Shamburger, Judge*, 314 Ky. 850; 238 S.W. 2d 844, January 26, 1951; Rehearing denied, May 11, 1951, the Opinion stated:

> (7) **"In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court;**

(1) A settlement suit filed (March 31, 1949) (and the Petition For An Injunction filed on) April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1946(9). The appeal is from an order of Hon. Horace M. Barker, former judge of Jefferson County Court, directing the Co-administrators to settle the estate. There has been no final disposition of either of these cases." * * * "If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement."

The above opinion and ruling clearly shows that the Joint administrators' Second Settlement Suit of the Estate, was pending in the Court of Appeals of Kentucky, Mrs. Smith's Injunction Suit against the Joint administrators was pending, and the Joint administrators' appeal filed in the Jefferson Circuit Court from the "Rule Issued" against them, and the "Order thereon" in the County Court, and the supersedeas issued on Judge Horace M. Barker by the Joint administrators, was still pending and those cases should have been disposed of before the Joint administrators had any more expensive hearings and proceedings in County Court under the new Judge Boman Shamburger, for which they and their attorneys have been awarded exorbitant fees by the District Court and upheld by the United States Court of Appeals for the Sixth Circuit.

Petitioner Mrs. Smith, has clearly shown that under the statutes and laws of Kentucky that she could not file an appeal to the Jefferson Circuit Court from such County Court so-called Judgment filed and entered on March 5, 1952, and the Amended so-called Judgment of May 1, 1952, because as has already been stated **Mrs. Smith was not present, and she was not represented by her counsel, at any of the hearings and proceedings in the Jefferson County Court, in 1951 and 1952 when the two Trust Companies and their two separate law firms were having hearings and proceedings** in County Court, and she did not file any exceptions in County Court to the purported final settlement of the accounts of the Estate of John A. O'Brien; and in

Mrs. Smith's Original Answer filed in this case on November 12, 1956, she specifically denied and controverted the allegations of the Trust Companies' Complaint, and stated on pages 127a-130a, A. "B", Volume I of the printed Transcript of Record, the following:

"—127a—

ANSWER AND COUNTERCLAIM OF DEFENDANT

"A COUNTY COURT JUDGE HAS NO JURISDICTION TO ENTER A JUDGMENT OR AMEND A JUDGMENT FOR A RECOVERY OF MONEY AGAINST PATRICIA O'BRIEN SMITH, OR ANYONE.

"15. Defendant denies that the so-called judgment filed and entered in the Jefferson County Court on March 5, 1952, in the Estate of John A. O'Brien, deceased, and the Amended Judgment filed and entered in the said estate on May 1, 1952, signed by Boman L. Shamburger, are valid or legal judgments upon which the Joint Administrators, The Louisville Trust Company and the Citizens Fidelity Bank and Trust Company, can collect any fee or fees or any other monies can be collected from Patricia O'Brien Smith. Defendant states that the Judgment referred to on page 12 of the Complaint herein, beginning with paragraph 2 on page 12 and covering pages 12, 13,

—128a—

ANSWER AND COUNTERCLAIM OF DEFENDANT

"14, and 15, 16, 17 and part of page 18, and also the Amended Judgment starting on page 18 and concluded on page 19 of the Joint Administrators' Complaint have no judicial effect since both the Judgment and Amended Judgment were erroneously entered and have been void since their inception and entry. Defendant denies that these Orders are now final or in full force or effect, and states further that there never has been any ground for such a Judgment or Amended Judgment. The hand written initialed

" 'O. K. Irvin Marcus,
Attorney for Louisville Trust Company,
O. K. Bullitt, Dawson and Tarrant,
Counsel for Citizens Fidelity Bank
and Trust Company,'

"approval on the so-called Judgment found on page 19 of the Complaint by the attorneys for the Joint Administrators cannot breathe life into those so-called Judgments which never have been, nor can they be of any judicial effect, and more particularly since the County Court Judge was not acting within the purview of the Statutes of Kentucky which confer upon him such powers as he has.

"**(1) A County Court Judge has no jurisdiction to enter a Judgment or an Amended Judgment for a recovery of money against Patricia O'Brien Smith or anyone else. This jurisdiction is vested in the Circuit Court, Quarterly Courts, Police and Magistrate's Courts.**

"(2) The Joint Administrators of the Estate of John A. O'Brien, Deceased, cannot cite any statute in Kentucky which provides that a County Court Judge has jurisdiction to enter a Judgment or an Amended Judgment for a recovery of money.

"(3) Patricia O'Brien Smith did not file any exceptions in the Jefferson County Court to the so-called final settlement of the Estate of John A. O'Brien, Deceased.

"(4) It has been consistently held by the Court of Appeals of Kentucky that where no exceptions are filed in County Court to the settlement of an estate that an order of a County Court confirming a settlement is not a final order or judgment and cannot be appealed from, and it was so held in the case of *Scott's Heirs* v. *Kennedy's Executor*, 12 B. M., 515, wherein it stated:

'There is in such a case, no judicial contest and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than a judicial act. Second. There is no final adjudication or determination in favor of one person or against another or upon any question of property or personal rights. Third. **The Settlement and its confirmation are not conclusive, either upon the parties who may have been interested in opposing it or upon the court itself**, which may order another

settlement, in which errors in the first may be corrected. Fourth. **It is not conclusive in any other court, but is only prima facie evidence, subject to be surcharged and falsified,** and may operate rather as a means of preserving evidence, and the preservation of which executors or other fiduciaries are entitled, than as a judgment; and **being made by officers under the supervision of the court, it ought to have, and has always had, the effect of prima facie evidence, but can always be questioned upon its merits by a bill in chancery.''**

''And in the case of *Stanbury's Admr.* v. *Robinson,* 16 Ky. Law Rep., 310, this court again reviewed this question, referring to the case, supra, and **held that the order approving the report of settlement made by the county judge and ordering it to be recorded, was not a final order.** Said case further held:

'In the case at bar, no formal written exceptions were filed to the report made by the judge to the

''—130a—

''county court of his settlement with appellant, nor was there any contest made in that court as to the validity of the charges complained of, or any judgment rendered passing upon the rights of the parties with reference thereto.'

'The mere formal entry of the order of confirmation of the settlement, no exceptions having been filed thereto, was not a final judgment conclusive of the rights of the parties from which appeal could be taken, and which precludes appellant from bringing his suit to surcharge and correct the alleged errors in the settlement **and to restrain the prosecution of suits for the collection of the balances found to be due by the heirs growing out of such errors.'**

''Since **Patricia O'Brien Smith did not file any exceptions in the Jefferson County Court to the so-called final settlement of the Estate of John A. O'Brien, Deceased,** the laws of Kentucky provide that a fiduciary

may bring an equitable action in the Circuit Court to surcharge the errors in a final settlement of an estate any time within five (5) years from the date the County Court enters an order confirming a settlement with a fiduciary. The so-called settlement of the O'Brien estate was confirmed and approved by the County Court on March 5 and May 1, 1952. This defendant has until May 1, 1957, within which to surcharge and falsify the so-called settlement of the Estate of John A. O'Brien, Deceased.

THE DEFENDANT DENIES THAT THE JOINT ADMINISTRATORS HAVE MADE ANY OVER-PAYMENTS TO HER.

"16. Defendant denies that the Joint administrators of the Estate of John A. O'Brien, Deceased, have made any over-payments to her from the estate of John A. O'Brien, Deceased, of Forty-two Thousand Nine Hundred Sixty-eight Dollars and Twelve Cents ($42,968.12), * * *"

By reading the excerpt from, and Mrs. Smith's Original Answer and Counterclaim, it clearly shows that the material facts were not established by any admissions in her pleadings, or by any judicial proceedings to which she was a party as was contended by the joint administrators on page 13, of their brief, (A. "B", pp. 121a-139a), and that there were genuine issues as to material facts, and that the material facts were not established by any admissions in Mrs. Smith's answer and Counterclaim on any of the Pleadings filed by Mrs. Smith in this Case and under Rule 56 of the Federal Rules of Civil Procedure the District Court should have denied the Joint Administrators' Motion for Summary Judgments.

Nowhere in the nineteen (19) separate proceedings summarized by the Court of Appeals, and referred to in a footnote on page 4 of Respondents Brief, did Mrs. Smith ever file any written exceptions or contest the settlement or any

item of the settlement of the O'Brien Estate. To contest the settlement or any item therein, an exception would have had to be made to specific items in the purported final settlement to form an issue therein for a contest or trial on that item, in County Court.

The commissioner filed his report with the County Court which was **wholly ex parte**, on January 7, 1952, in keeping with KS 1067 now KRS 25.190 and 25.200. (See A. "A", pp 5-7). Mrs. Smith still had time to file exceptions, she even made a Motion for an extension of time in which to file exceptions which was for delay, still attempting to effect the restoration of the Records of the O'Brien Estate which had been lost or stolen, and had not been legally restored because the Joint administrators had refused to. (*Smith* v. *Louisville Trust Co. and Citizens Fidelity Bank & Trust Co.*, 262 S.W. 2d 479, November 20, 1953).

Since no exceptions were filed by Mrs. Smith to the report and supplemental report of the commissioner, and the award and approval of the County Judge of March 5 and May 1. 1952, was approved and recorded and simply became a ministerial act, and the settlement so made and recorded became prima facie evidence between the parties interested, and under the laws of Kentucky the items of said settlement are subject to be surcharged and falsified within five years. This was done by Mrs. Smith in her First Amended Answer and First Amended Counterclaim with Exhibits "A" to "G", tendered on February 23, 1957, in the office of the Clerk of the District Court, in the within case, (A. "B", pp 165a-330a) before the expiration of five years.

Also, Mrs. Smith filed a bill in Chancery or Complaint, in the Jefferson Circuit Court, Chancery Branch, First Division, No. C. R. 25416, on February 28, 1957, to surcharge and falsify the purported final settlement of the accounts of the Joint administrators before the expiration of five years. This action is still pending in the Jefferson Circuit Court, and an order entered staying the case, until the final determination of the within case.

Thus the District Court took a settlement and a commissioner's report which was recorded as prima facie evidence under KRS 25200 in the O'Brien Estate, called it a final Judgment, before the time had expired to surcharge and falsify said settlement and gave a Summary Judgment against Mrs. Smith **for $73,756.98, in direct violation of the statutes and laws of Kentucky, and if this Writ is denied Mrs. Smith will be deprived of $73,756.98 plus interest without due process of law, in addition to other items and amounts of cash assets.**

8.

The Petitioner's Counterclaim, First Amended Counterclaim and Second Amended Counterclaim.

The Joint administrators did not correctly state what the Petitioner Mrs. Smith charged in her original counterclaim, first amended counterclaim, and second amended counterclaim. Petitioner's original counterclaim charged that, —

> **"the Joint administrators, their officers, agents and attorneys by undue influence, persuasion, threats and coercion induced and procured Patricia O'Brien (Smith) over her objections to acquiese in said sale and conveyance of said partnership interest" * * * "Patricia O'Brien (Smith) did not know at that time that the interest then owned by the Estate of John A. O'Brien in said partnership of Edward J. O'Brien Company was of the aforesaid value of $1,202,035.04 * * * and the pressure, coercion and threats used and exerted, by said Joint administrators and their officers and attorneys to induce Patricia O'Brien (Smith) to acquiese in said sale and conveyance were such acts of which it is inconceivable of anyone acting in a similar fiduciary capacity and similarly situated, desiring to do his duty would, in the exercise of ordinary skill, prudence and diligence, have been guilty." (See paragraphs 8 and 10 of Original Counterclaim, A. "B", pp 137a-138a).**

And that the Joint administrators in making the sale of her partnership interest for only $380,000.00, when the said interest was worth at least $1,202,035.04 had caused the loss of $822,035.04 to Patricia O'Brien-Smith on account of the aforesaid sale and conveyance of her interest in said partnership of Edward J. O'Brien and Co., owned by Mrs. Smith. (See Printed Transcript of Record A. "B", pp 134a-139a).

With the Petitioner's first amended answer and counterclaim, she tendered 7 Exhibits, and with her second amended answer and second amended counterclaim, she tendered therewith 33 Exhibits numbers 42 through 75, which were certified and authenticated, which included and proved conclusively the value of her partnership interest, as she had alleged in her original counterclaim; and that she had been defrauded of over two-thirds of the value of her interest in the partnership of E. J. O'Brien & Company and its four subsidiaries, which was sold by the Joint administrators. (A. "B", pp 224a-330a; A. "C", pp 1706-1989a).

The Respondent Trust Companies would have this Court believe that Mrs. Smith filed her Motion for leave to file her first amended answer and amended counterclaim, after the District Court rendered his opinion and dismissed her original counterclaim. When in truth and fact, the Motion for leave to file the first amendments were filed two and one-half (2½) years before Judge Kent was appointed to hear this case, and four (4) years before the District Court (Judge Kent) ruled thereon. Mrs. Smith filed her Motion For Leave To File Her First Amended Answer and Her First Amended Counterclaim on February 23, 1957, which was tendered therewith and Exhibits A to G, three (3) months after she had filed her original answer and counterclaim on November 12, 1956, (see A. "B", pp 164a-330a).

Judge Kent was not designated to hear this case until in July 1959, and he did not rule on Mrs. Smith's above Motion until April 20, 1961, when he entered an order thereon. (See A. "C", p. 1696a).

The District Court rendered his opinion on March 4, 1961, wherein he dismissed Mrs. Smith's original counterclaim upon the grounds that it was (a) barred by the Kentucky Statutes of Limitations and (b) barred by the rule of res judicata by the Judgment of May 23, 1940, in her rescission suit which was against only the brothers of John A. O'Brien.

9.

We have clearly shown in the Petitioner's Petition for a Writ of Certiorari on pages 187-198, that the issues presented by Mrs. Smith's Original Counterclaim are not barred by the statutes of limitation, and the Court of Appeals did not rule on this issue.

When the so-called Judgment of the County Court of March 5, 1952, was amended on May 1, 1952, the Joint administrators were not discharged and released from liability under their bond. And they are still the Joint administrators of the Estate of John A. O'Brien, and they are still bound by Kentucky law to file a final settlement of the O'Brien Estate in the Jefferson County Court. Thus, the statute of limitation did not begin to run until May 1, 1952, even if the so-called amended Judgment be considered a final settelement. Mrs. Smith would have 15 years from May 1, 1952, or to May 1, 1967, in which to file suit against the Joint administrators on their bond under KRS 413.090, *U.S. Fidelity and Guaranty Co.* v. *Shields*, 157 Ky. 371; 163 S.W. 203, also see KRS 62.060; KRS 25.175; KRS 62.070; KRS 287.220; 44 ALR (2d) pp 808, 809; *Hargis* v. *Sewell's Admr.*, 87 Ky. 63; 7 S.W. 557; 9 Ky. Law Rep. 920; *Kitchen's Ex'rs.* v. *King*, 255 Ky. 235; 73 S.W. 2d 45; *Anspacher* v. *Utterback's Adm'r*, 252 Ky. 666; 68 S.W. 2d 15; *Blackwell et al* v. *Fidelity and Deposit Co.*, 163 Ky. 76; 173 S.W. 321; *Blake* v. *Wolfe*, 105 Ky. 380; 49 S.W. 19; 20 Ky. Law Rep. 1212; *Wren's Ex'r* v. *Wren's Ex'r*, 126 Ky. 704; 104 S.W. 737; 31 Ky. Law Rep. 1096; *Rison et al* v. *Shepherd et al.*, (1945) 299 Ky. 693; 186 S.W. (2d) 648; *Tucker* v. *Aetna Casualty & Surety Co.*, 270 Ky. 723; 110 S.W. (2d) 649; *Schwerman* v. *Commonwealth*, 99 Ky. 296; 38 S.W. 146; 18 Ky. Law Rep. 585; *Grant County Building & Loan &*

Savings Association v. *Lemmon*, 78 S.W. 874; 25 Ky. Law Rep. 1725; *Commonwealth* v. *Sammons*, 180 Ky. 403; 202 S.W. 885.

10.

The Petitioner has clearly shown herein that her original counterclaim filed herein is not barred by the rule of res judicata, by the Judgment of May 23, 1940 in her rescission suit, in which she is fully upheld by the Order and Opinion of Judge E. B. Freed, supra.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals For The Sixth Circuit Did Not Follow Or Apply The Kentucky Law Governing The Final Settlement Of Accounts Of Administrators Of An Estate In Kentucky, In The O'Brien Estate

Petitioner's Petition for Certiorari clearly set out sixteen (16) reasons for granting the writ, and Mrs. Smith has clearly shown that in the twenty-eight (28) years in which the joint administrators have illegally withheld the assets of the estate of John A. O'Brien, in default of their statutory duties, that **she has only filed one lawsuit against the joint administrators** of the O'Brien Estate which was dismissed without prejudice and never went to trial. On the other hand, Mrs. Smith has clearly shown that **the joint administrators have filed three separate settlement suits in the Circuit Court in the O'Brien Estate, numerous appeals and Petitions for rehearing, in the Court of Appeals of Kentucky, in one of which Mrs. Smith was granted a permanent injunction by the Court of Appeals of Kentucky, supra, enjoining the joint administrators from prosecuting a second settlement suit of the Estate**, after they had lost their first settlement suit, in which **the Court of Appeals of Kentucky held that Mrs. Smith's demurrer to the Petition in the first settlement suit, should have been sustained by the Circuit Court, and in effect held that the Writ of Prohibition against the State Court Judge which Mrs. Smith sought, to prevent the trial of the case in the first settlement suit, should have been sustained, which** would have prevented long years of

expensive, harrassing and needless litigation and would have saved the wasting of the assets of the O'Brien Estate, and thousands of dollars which Mrs. Smith has had to pay for out of her own personal funds. Thus, it has been the two Trust Companies the Joint administrators' numerous litigations over Mr. O'Brien's Estate, wherein Mrs. Smith won four decisions from the Court of Appeals of Kentucky against them. From the ruling of the District Court, which was upheld by the United States Court of Appeals for the Sixth Circuit, it appears that neither of the Courts ever saw the correct or complete Printed Transcript of Record of the within case, or ever knew about the Joint administrators' numerous litigations in the O'Brien Estate. The statutes and law of Kentucky governing the final settlement of an estate and the rights of a beneficiary of an estate, cannot be rewritten or ignored, because a beneficiary of an estate has been forced to answer joint administrators' numerous litigations over an estate in which they failed and refused to disclose the nature or value of the O'Brien Estate, and have concealed the value of the said Estate as was so held by three opinions of the Court of Appeals of Kentucky in favor of Mrs. Smith, wherein the joint administrators were seeking the approval of the Court for their sale of Mrs. Smith's partnership interest, and the approval of all their acts and deeds in handling and representing the O'Brien Estate, **yet the Joint administrators have failed and refused four times to draw their complaint to comply with the requirements of Section 429 of the Civil Code of Practice of Kentucky, in order to get the approval in the Circuit Court.**

In stating the true and correct facts, about the Joint administrators numerous litigations over Mr. O'Brien's estate, and wherein the United States Court of Appeals for the Sixth Circuit had no grounds for their findings and rulings, does not violate this Court's Rule 23-4, or any other Rules of this Court. The mere fact that Mrs. Smith, had many days in Court on three trumped-up lawsuits filed by

the joint administrators, which she won, "does not mean that she has had her day in Court," on the merits or validity of the joint administrators' purported final settlement of the accounts of the Estate of John A. O'Brien, in County Court, and we have clearly shown that **"Mrs. Smith has not had her day in Court on the joint administrators' purported final settlement of their accounts of the O'Brien Estate."**

The argument by the joint administrators in this case from the beginning, has been that Mrs. Smith should have appealed within 60 days—appealed from what? There was no trial had in this case in County Court. The purposes of an Appeal in Equity is for a Trial *De Novo—Simmons* v. *Stern*, CCA—N.M. 9 Fed 256-259. The judgments entered herein on March 5, 1952, and amended judgment of May 1, 1952, are wholly *ex-parte* and appear of record in Minute Book No. 116, pp 386-388, in the Jefferson County Court. Since **the ex parte Judgments were for one side only**, and **only the joint administrators and their attorneys were present at the hearings and proceedings in County Court had in the settlement of the O'Brien Estate**, and its approval or confirmation by the County Judge is not conclusive in any other court, these *ex parte* Judgments become only prima facie evidence of the joint administrators' settlement, and can always be questioned on their merits by a bill in Chancery by any party who may be interested in opposing the order or judgment *ex parte*, if done under the Kentucky law within five years from the date of entry. This was done by Mrs. Smith, in the amended counterclaim tendered for filing on February 23, 1957, in this suit filed against Mrs. Smith on September 13, 1956, by the two Trust Companies, and also by Mrs. Smith filing a suit, or her Bill in Chancery in the Jefferson Circuit Court, on February 28, 1957, to surcharge and falsify the joint administrators' purported final settlement of their accounts of the O'Brien Estate; in which an order was entered staying the proceedings in the case until final determination of the within suit. And that Order is still in effect.

If the District Court did not have jurisdiction over probate matters, then how could the District Court have jurisdiction to determine whether the Trust Companies so-called settlements of their accounts of the O'Brien Estate in a County Court was a final settlement, and rule that Mrs. Smith's only remedy was by an appeal within a sixty (60) day period?

The mere fact that the Trust Companies dogmatically label their *ex parte* proceedings a final settlement, definitely does not make this filing of their accounts and disbursements in an *ex parte* proceeding, before a commissioner who awards and fixes fees for attorneys and administrators a final settlement, when the validity of the fees go unquestioned and unchallenged, when Kentucky law and probate procedure provide that they may be challenged. Thus, this cannot be nor does it make a final settlement, when said claims were challenged within the 5 years by Mrs. Smith. Further, name-calling by the Trust Companies does not make a final judgment or final settlement, out of those *ex parte* proceedings, in which the District Court and the Court of Appeals erroneously **misconstrued** and upheld as a final settlement, when it is only an administrative *ex parte* proceeding. (See District Court's Opinion and Mrs. Smith's Petition for Rehearing, Transcript of Record A. "C", pp 1607-1691a; also see Appendix E. and F. herein and Court of Appeals Opinion and Mrs. Smith's Petition for Rehearing A. "D", pp. 2368a-2575a),

The Trust Companies contradict themselves on pages 8 and 9, of their brief, where they contended in one breath that the District Court, did not approve the purported final settlements of the accounts of the joint administrators of the O'Brien Estate, which they contend was made by the Jefferson County Court by its March 5, 1952 Judgment, and amended Judgment of May 1, 1952, and in the next breath, in speaking of the District Court's ruling, the joint administrators say that the District Court held and approved the amount of attorneys fees and the joint administrators' fees of $73,768.98, which had been awarded to them by the

Jefferson County Court, when neither Mrs. Smith or her counsel, were present, to except and introduce proof that they were not legally entitled to any fees at all.

When the District Court ruled that the purported final settlement of the accounts of the O'Brien Estate was a final settlement, he definitely took Jurisdiction over a Probate matter. In the District Court's decision therein by his ruling which the Court of Appeals upheld, they decided an important question of Kentucky Law in conflict with applicable Kentucky Law and Kentucky Statutes; as we have clearly shown, they did not apply the Kentucky Law or Kentucky Revised Statutes governing the final settlement of accounts of administrators of an estate in Kentucky, and completely misconstrued the following Kentucky cases: *Scott's Heirs* v. *Kennedy's Ex'r.*, 12 B.Mon. 510; 51 Ky. 510-517. 4 KLR 712 (1849); *Stanberry's Adm'r* v. *Robinson,* 16 Ky. Law Rep. 310; *Harper* v. *Lamb, Ballantine et al.* v. *Harper et al.*, 202 Ky. 771, 261 S.W. 280-282 (Court of Appeals of Ky. April 25, 1924); *Frazier* v. *Kavanaugh Adm'r,* 4 Ky. Law Rep. 712; Article 5, Chapter 35 Kentucky Statutes.

By the above cited cases, it clearly shows that both the District Court and the Court of Appeals decisions were in conflict with the applicable Kentucky Law, and they did not follow or apply, the Kentucky Law in ruling that Mrs. Smith cannot now be permitted to surcharge and falsify the purported final settlement of the joint administrators' accounts of the O'Brien Estate.

The joint administrators state that the District Court ruled that it was a final settlement and that the Court of Appeals in affirming also held that the County Court settlement was a final settlement and they state that Mrs. Smith made it a final settlement, but they do not correctly state what steps Mrs. Smith took after the settlement was filed. Mrs. Smith did not try to prevent the joint administrators from filing a settlement. Mrs. Smith only objected to the joint administrators having expensive hearings before a commissioner in County Court on the purported final settle-

ment of the accounts for four reasons, (1) while the joint administrators' second trumped-up settlement suit of the O'Brien Estate was pending in the Court of Appeals of Kentucky, (2) Mrs. Smith's injunction suit to enjoin the joint administrators from prosecuting their second trumped-up settlement suit of the O'Brien Estate in Jefferson Circuit Court, was pending in the Court of Appeals of Kentucky, and (3) the Appeal filed by the joint administrators in the Jefferson Circuit Court on May 26, 1949, from the "Rule Issued" against the joint administrators and the Order thereon, by Judge Horace M. Barker, Judge of the Jefferson County Court, to file a final settlement of the O'Brien Estate on June 2, 1949, and the injunction and supersedeas issued against Judge Barker in the County Court, by the joint administrators, issued on May 26, 1949 and executed on June 2, 1949, to stay all proceedings in the County Court in the final settlement of the O'Brien Estate, was still pending, even though a new Judge had been elected and took office in 1950, (Judge Shamburger) and (4) all of the Original Records in the Estate of John A. O'Brien were still missing and had not been returned or legally restored, which were taken from the office of the Clerk of the Jefferson County Court to the Jefferson Circuit Court, when the joint administrators filed their Appeal in the Circuit Court on May 26, 1949, from the Rule Issued against them and the Order thereon by Judge Horace M. Barker, Judge of the County Court, and had a supersedeas issued and served on Judge Barker, to stay all proceedings in the Estate of John A. O'Brien; and the records were not legally restored until October 1954, almost a year after the Court of Appeals ordered and directed the joint administrators to legally restore the records in the O'Brien Estate, in which Mrs. Smith was fully upheld in the opinion of *Smith* v. *Shamburger, Judge,* 314 Ky. 850; 238 S.W. 2d 844, January 26, 1951, even though the injunction against Shamburger was denied.

How could the true facts in regards to the steps taken by Mrs. Smith as above stated, be construed that Mrs. Smith

was "contesting, resisting, objecting to or challenging the accounts which made the settlement become final," as held by the two Courts. None of the Kentucky Law Citations cited in the joint administrators' brief on pages 9, 10 and 11 thereof, which they quoted from the District Court's opinion and the Court of Appeals' opinion uphold any such construction, as those two Courts put upon them, when the opinion of the Court of Appeals of Kentucky in the case of *Smith* v. *Shamburger*, supra, upheld Mrs. Smith in her above stated contentions, where they stated therein as follows:

> **(7) "In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court; (1) A settlement suit filed (March 31, 1949) (and the Petition For An Injunction filed on) April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1946(9). The appeal is from an order of Hon. Horace M. Barker, former judge of Jefferson County Court, directing the Co-administrators to settle the estate. There has been no final disposition of either of these cases." * * * "If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement." (Also see Writ of Certiorari, pp 112-121).**

The opinion in effect held that the settlement could not be a final settlement until those two cases and the joint administrators' Appeal from the Rule Issued against them were ruled on, and even though they stated that Mrs. Smith would have a remedy by another appeal from the County Court's ruling, they did not rule that she could not wait five years as provided by the Kentucky law and Statutes, and file a suit to surcharge and falsify the purported final settlement which she elected to do, since there are two ways provided to challenge the final settlements of the accounts

of an administrator in Kentucky as has already been set out herein.

There has been a successful effort to mis-lead the Courts into believing that Mrs. Smith had only one course to follow after the Trust Company lawyers had their *ex parte* proceedings in fixing their fees, and that she should have appealed. We have shown that is not true and that Mrs. Smith had a legal right to surcharge and falsify the settlement within five (5) years.

Administrators in making final settlements in Kentucky before 1942 under *KS Section 1067* would file same with the County Court Clerk then the settlement would lay over one term (30 days) for exceptions; if no exceptions were filed at the succeeding term of Court then the settlement would be recorded and become prima facie evidence between the parties, but could be surcharged and falsified within 5 years.

Since 1942 under *KRS 25.200(1067)* administrators in making final settlements file same with the County Court Clerk and the settlement lays over "not less than 10 days or until the first day of the next term of Court during which, or at which exceptions may be filed by any person interested. If no exceptions are filed the report * * * shall be approved and recorded * * * settlements so made and recorded shall be prima facie evidence between the parties interested," and can be surcharged and falsified within 5 years.

This so-called final settlement was filed with the County Court Clerk and laid over after the *ex parte* proceeding, then was the time for Mrs. Smith to file her exceptions or wait and surcharge and falsify the settlement for fraud, mistakes or invalid claims, within five (5) years.

The District Court and the Court of Appeals evidently failed to read the Kentucky Statutes and the Kentucky Decisions relating to the settlement of estates in Kentucky.

All the appearances made by Mrs. Smith were in the preliminary proceedings. All the motions and pleadings filed by her were for delaying purposes seeking the restoration of records which were stolen or lost by the actions of the attorneys for the administrators.

Since Mrs. Smith did not file any written exceptions to test the validity or the merits of the claims filed and approved by the County Court, she had a further course which was open and **that was not by appeal,** as the Trust Companies insist, **but by surcharging** and **falsifying** the respective claims approved by the County Court, and under Kentucky Law she had within five (5) years from March 5 and May 1, 1952, to wit until May 1, 1957 to so do, and she did, as we have clearly shown herein.

II. The Court Of Appeals For The Sixth Circuit Did Not Follow Or Apply The Kentucky Statutes Or The Kentucky Revised Statutes Governing The Final Settlement Of Accounts Of Adminisrators Of An Estate, Or The Administration Of An Estate In Kentucky, In The O'Brien Estate In Which The Joint Administrators Violated More Than Nine (9) Kentucky Statutes

The District Court and the Court of Appeals, failed to follow or apply the Kentucky revised Statutes governing the final settlements of Estates in Kentucky in the O'Brien Estate and the Kentucky Revised Statutes which the Trust Companies violated in representing the O'Brien Estate, and what it cost Mrs. Smith thereby, are as follows:

1. *Under KS 3858 now KRS 25.175,* the joint administrators violated this statute by not filing a final settlement of the O'Brien Estate in the Jefferson County Court on March 1, 1936, two years after their appointment.

It cost Mrs. Smith thousands of dollars to defend the two trumped-up settlement suits in the O'Brien Estate filed and prosecuted by the joint administrators in the Jefferson Cir-

cuit Court, **on petitions and amended petitions which were filed by them, which did not comply with Section 429 of the Civil Code of Practice of Kentucky, as held by two opinions from the Court of Appeals of Kentucky in two lawsuits which Mrs. Smith won against them,** after eleven years and fourteen years of litigations in the Courts of Kentucky.

2. *Under KRS 25.170 (1062; 1065),* the joint administrators owe ten dollars per day from March 1, 1936, until June 21, 1950, when they filed their first purported final settlements of their accounts of the O'Brien Estate in the Jefferson County Court which amounts to 5,227 days that they were delinquent in filing their first partial settlement of the O'Brien estate in County Court, at ten dollars ($10.00) per day, which equals a total amount of fifty-two thousand two hundred seventy dollars ($52,270.00) that the joint administrators owe for violating this Statute. This Statute specifically states that;

> **"any fiduciary failing without good cause therefor, when so notified to settle his accounts, shall be fined by the judge, for each day he so fails or refuses after notice, ten dollars, to be collected by rule or other process;"**

Now **both of the joint administrators were notified and ordered three times by three different Courts to file a final settlement of the O'Brien estate in County Court, and that they were delinquent in the filing thereof.** (1) The joint administrators were notified by Judge Mark Beauchamp, Judge of the Jefferson County Court on January 21, 1939, that **"under the Provisions of the Law that their settlement of the O'Brien Estate was due to be filed in County Court on March 1, 1936 and to file it immediately."** They were three years in default of their statutory duty then, but **they still defied the order of the Court and refused to file a settlement of their accounts.** See letter of Judge Mark Beauchamp, County Judge, to the joint administrators dated January 21, 1939, which is as follows:

"No. 24146 January 21, 1939

JEFFERSON COUNTY COURT
MARK BEAUCHAMP, COUNTY JUDGE

"The Louisville Trust Company, and
Citizens Fidelity Bank & Trust Company,
5th and Market Sts.,
Louisville, Ky.

"Dear Sirs:—

"On March 1st, 1934, You Were Appointed Co-Executors of the Estate of John A. O'Brien, Deceased, In The Jefferson County Court. Under the Provisions of the Law Your Settlement Was Due March 1st, 1936.

"Please Take Up This Matter At Once With Any Of The Following Commissioners."

"The Judge listed six commissioners, their addresses and telephone numbers.)"

/s/ MARK BEAUCHAMP
Judge of Jefferson County Court"

(See Writ of Certiorari, pp 89-90.) (2) After the first opinion was rendered in the Court of Appeals of Kentucky and the rehearing was denied in 1948, wherein **the Court of Appeals ordered and directed the joint administrators to file a final settlement of the O'Brien Estate in County Court,** in the case of *Smith* v. *The Louisville Trust Company and Citizens Fidelity Bank & Trust Company*, 308 Ky. 189; 213 S.W. (2d) 987 (June 8, 1948) Rehearing denied Oct. 29, 1948. (3) Then on February 24, 1949, Mrs. Smith filed a "Motion For Rule Against The Joint Administrators To File A Final Settlement Of Their Accounts Of The OBrien Estate, in County Court," in compliance with the opinion of the Court of Appeals of Kentucky, supra. The said motion was granted and **order entered on Februray 24, 1949, that a Rule Issued against the said joint administrators to settle the accounts of the Estate of John A. O'Brien on or before March 1, 1949.** (A. "B", pp. 713a-717a). **The joint administrators still**

refused to file the final settlement of the O'Brien Estate in County Court, and did not file even a partial settlement of the Estate until June 21, 1950.

3. *KRS 25.190*—The joint administrators violated this statute by contending that their purported final settlement of their accounts of the O'Brien Estate made and recorded in the County Court in January 1952, was not prima facie evidence between the parties interested, as this statute holds.

4. *KRS 25.200*—The joint administrators violated this statute, by contending that Mrs. Smith was not entitled to file exceptions to their purported final settlement of their accounts of the O'Brien Estate which was prima facie evidence between the parties interested.

5. KRS 64.260 (396; 401; 407; 408; 1740) states that, "Commissioners and receivers. (1) The fees of court commissioners and receivers for the following services shall be as follows:

> **"To a commissioner for alloting dower, dividing land or settling accounts, per day ..... $1.50"**

As shown, this statute provides that one dollar and fifty cents ($1.50) will be allowed per day for the service of a special commissioner to have hearings in the County Cour of Kentucky on administrators' *ex parte* proceedings on their final settlements of estates. The joint administrators violated this statute when on March 4, 1952, they paid to A. Scott Hamilton, $2,000.00, the commissioner who made and approved the joint administrators' purported final settlement of the accounts of the O'Brien Estate (who committed suicide shortly there after), for services rendered for the joint administrators' hearings held in the Jefferson County Court in their *ex parte* proceedings on their purported final settlement of the O'Brien Estate in County Court for six (6) days on July 12, December 17, 18, 19, 28, 1951, and January 2, 1952. Thus the commissioner was paid three hundred thirty three dollars

and thirty three cents ($333.33) per day for six days, when under this statute he was only entitled to one dollar and fifty cents ($1.50) per day, a total of nine ($9.00) dollars, for his services rendered to the O'Brien Estate, resulting in a loss to Mrs. Smith of one thousand six hundred sixty six dollars and sixty seven cents ($1,666.67).

6. *KRS 395.255* states that, **"If a fiduciary neglects or refuses to file an inventory or account when due according to law, or when ordered by the court, the court shall notify the fiduciary of his delinquency and fix a date when such inventory or account must be filed." * * * "If the fiduciary fails to file such account within thirty days after the date fixed in said notice, no allowance shall be made for his services."**

The joint administrators violated this statute, when they failed and refused to file an inventory or a settlement of their accounts of the O'Brien Estate when it was due according to law on March 1, 1956, and when they were ordered to do so by Judge Mark Beauchamp of the Jefferson County Court on January 21, 1939, by the Court of Appeals of Kentucky on October 29, 1948, and by Judge Horace M. Barker, Judge of the Jefferson County Court on February 24, 1949, and under this statute they should have been removed for being delinquent; and after the joint administrators failure to file their final settlements of the accounts of the O'Brien Estate within thirty days after the date fixed in the first notice, no allowance should be made for any joint administrators' fees or attorneys' fees in the estate of John A. O'Brien after January 21, 1939. Therefore, the joint administrators are not entitled to any fees or fees for their attorneys and their Judgments obtained in County Court and approved by the District Court and the Court of Appeals for the Sixth Circuit, said Judgments were obtained by fraud and should have been set aside by the District Court who took jurisdiction of this probate matter as we have clearly shown, and we are supported in our contentions by the cases of, *Griffith* v. *Bank of New York*, 147 Fed. (2d) 899, Febru-

ary 16, 1945; *Rogers* v. *Girard Trust Co.*, 159 F. 2d 239, (1947); and *Meredith* v. *City of Winter Haven*, 320 U.S. 228; 64 S.Ct. 7, at page 11, (1943). (See Writ of Certiorari, pp 157-171.)

7. *KRS 395.310* states that, "**A personal representative, after the expiration of two years from the time he qualifies, shall be charged with interest on the surplus assets in his hands from that period, and before the expiration of two years shall be charged with all interest realized on assets.**" The joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $25,000.00 cash belonging to Mrs. Smith which they held in their banks from February 11, 1936 to June 28, 1946, which amounts to.....$20,779.38
The joint administrators violated this statute by not allowing interest compounded at the rate of 6% per annum on $40,000.00 cash belonging to Mrs. Smith which they held in their banks from June 28, 1946 to November 9, 1962, which amounts to $63,852.57
cash which they still have in their possession as well as the cash in the amount of $40,000.00. The interest alone to November 9, 1962, amounts to .....$84,631.95.

(See Writ of Certiorari, pp 182-184, and pp 199-201).

8. *KRS 446.070* (466) states that, "**A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.**"

Under this statute Mrs. Smith is entitled to recover from the joint administrators of the O'Brien estate all the costs for attorneys fees, printed records, and printed briefs, in defending the two trumped-up settlement suits which the joint administrators filed in the Jefferson Circuit Court, and **prosecuted from February 1937, through April 17, 1951, in both cases of which the Court of Appeals**

of Kentucky held were filed and prosecuted on defective petitions and amended petitions which did not comply with Section 429 of the Civil Code of Practice of Kentucky, because the joint administrators wanted to conceal and refused to disclose "the nature and value of the property, real and personal, of the decedent, (John A. O'Brien) so far as known to the plaintiffs." (Trust Companies) and **the joint administrators did not and would not comply with Section 429 of the Civil Code of Practice of Kentucky**, as required by that statute, in order for them to get the approval of their sale of the partnership interest owned by Mrs. Smith, in the Edward J. O'Brien & Company and its four subsidiaries, and in order for them to get the approval of the Circuit Court of all their acts and transactions pertaining to the administration of the Estate of John A. O'Brien.

Surely this Court will not believe that the two law firms of Bullitt, Dawson and Tarrant, and Davis, Boehl, Viser and Marcus, did not know how, and could not find out how to comply with **Section 429 of the Civil Code of Practice of Kentucky from February 1937 to April 17, 1951**, during the years they refused to file a final settlement of the accounts of the Trust Companies of the O'Brien Estate, and kept the O'Brien Estate in constant litigation, for which they were awarded $73,768.98.

9. KRS 413.090 (2514) provides: "Action upon Judgment, Written Contract or Bond; Fifteen Year Limitation.—

"(3) **An action upon the official bond of a sheriff, marshall, clerk, constable or any other public officer, or any commissioner, receiver, curator, personal representative, guardian, committee, or trustee appointed by a court or authority of law.**"

This statute provides that an action on the Bond of the joint administrators, shall commence within fifteen years after the cause of action first accrued, and Mrs. Smith's cause of action against the joint administrators in the Estate of John A. O'Brien could have been filed under

this statute as late as 1965, because the joint administrators did not file their purported final settlement of the O'Brien estate until on June 21, 1950, which was confirmed and the Judgment was entered on March 5, 1952 and amended on May 1, 1952, under which the joint administrators were not released from their Bonds, and are still under their Bonds, as joint administrators of the O'Brien Estate, therefore Mrs. Smith's original Counterclaim filed on November 12, 1956, was not barred by the Statute of limitations.

The acts and conduct of the joint administrators in employing attorneys to aid and assist them in evading and violating all the Kentucky statutes governing the final settlements of their accounts in the O'Brien Estate, and the statutory duties of the joint administrators as aforesaid, were unconscionable and fraudulent, and the allowance or payment of any administrators' fees, or attorneys' fees out of the O'Brien estate is, and would be inequitable, fraudulent, illegal and unjust, and should be disallowed.

Thus, it is clearly proven that the joint administrators have violated nine Kentucky Statutes governing the administration of, and the final settlement of their accounts of the Estate of John A. O'Brien, and that the District Court and the Court of Appeals did not follow or apply the Kentucky Revised Statutes governing the Administration of and the final settlement of the O'Brien Estate, and they decided important questions of Kentucky Statutes in conflict with the statutes of Kentucky, and have decided important State questions in a way in conflict with applicable State law and State Statutes.

III. The Rulings Of The District Court, Which Were Upheld By The Court Of Appeals For The Sixth Circuit, Violated Rule 15, Of The Federal Rules Of Civil Procedure In Not Permitting Mrs. Smith To File Any Amendments To Her Original Answer Or Her Original Counterclaim

The Petitioner Mrs. Smith was denied the right to file a single amendment either to her original answer, or her original counterclaim, which she tendered, and sought to file under Rule 15 of the Federal Rules of Civil Procedure. By those amendments she sought to *surcharge* and *falsify* the joint administrators' purported final settlement of their accounts of the O'Brien Estate, and she tendered with the amendments, audits, appraisals, contracts and other exhibits, which were all certified and authenticated documents, which proved all her claims and the additional cash values she was entitled to from the O'Brien Estate which she inherited. Her claims were not barred either by Kentucky limitations Statutes or under the Rule of res judicata, as we have clearly shown in the Petition for Writ of Certiorari pages 187-198; and pages 129-138. A mere reading of the amendments, and the exhibits tendered therewith, clearly show that the allegations asserted in the amendments are meritorious claims, and that denial of leave to file her amended answers and her amended counterclaims sanctioned a radical departure from accepted standards of Judicial procedure, in the settlement of estates in Kentucky.

If time did not bar the joint administrators from filing a complaint in the within suit in 1956, in which they raised the issue, and sought the approval of the Courts for their sale of Mrs. O'Brien-Smith's partnership interest in E. J. O'Brien & Company and its four subsidiaries, in violation of the terms of the partnership agreement, and for less than one-third of its value, **then time cannot legally bar Mrs. O'Brien-Smith from introducing proof in a trial on the material facts which were put in issue, when she denied and controverted the allegations set forth in the**

joint administrators' Complaint, as proven herein. (See Petition for Writ of Certiorari, pp 191-198). Further, this case involves far more than the issue of the sale of Mrs. Smith's partnership interest in Edward J. O'Brien & Company and its four subsidiaries, as we have clearly shown and proven.

IV. The Decision Of The Court Of Appeals For The Sixth Circuit, Is In Conflict With The Second Circuit Court Of Appeals, The Seventh Circuit Court Of Appeals, Their Own Sixth Circuit, And With This Court's Ruling

The decision of the Sixth Circuit Court of Appeals is in conflict with the decision of the Second Circuit Court of Appeals, the Seventh Circuit Court of Appeals and their own, the Sixth Circuit Court of Appeals, and with this Court's ruling wherein this Court granted a Petition for a Writ of Certiorari in the case of *W. J. Meredith et al.* v. *City of Winter Haven*, 320 U.S. 228-238 (1943).

1. In the case of *Griffith* v. *Bank of New York*, 147 F. (2d) 899, Circuit Court of Appeals, Second Circuit, (1945).

That was a suit by residuary legatee against testamentary trustee for damages for breach of duty as trustee and duress, and the Court ruled that the action could be maintained in Federal Court, even though a Judgment of the State Court had been entered settling the Trustee's account, and the Petition had been dismissed for reasons not going to the merits and the Court of Appeals reversed and remanded the case, and held that:

> "we cannot agree with the District Court's further conclusion that a judgment cannot be attacked collaterally, and that parties seeking relief from it must do so in the original action. For it is well settled that the federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court judgment obtained by fraud."

In that case even though an agreed judgment had been filed and entered the Court of Appeals held that the Dis-

trict Court should have taken jurisdiction for the legatee's suit for damages against the trustee.

As there so here in the instant case the District Court should have taken jurisdiction of Mrs. Smith's Amended Counterclaims, when there had not even been a judgment rendered in the within case, because a County Judge in Kentucky cannot legally render an in personnam judgment.

In the case of *Paul et al.* v. *Girard Trust Co.*, 124 F. 2d 809 (1941). Circuit Court of Appeals, Seventh Circuit. That was a suit by beneficiaries against the Girard Trust Company individually and as Trustee, to surcharge the trustee for loss on investments under the laws of the State retained by trustee and for interest thereon.

The Court of Appeals held: "that the trustee was not authorized by the trust agreement to retain non-legal securities: that plaintiffs are not estopped to bring this action; and that the surcharge was in all respects properly computed."

As there, so here, Mrs. Smith should have been granted the right in the Federal District Court to surcharge the Two Trust Companies, for all losses sustained by her, under the laws of Kentucky which she sought to do by the filing of a "Motion For Leave To File Her First Amended Answer and Her First Amended Counterclaim," with Exhibits "A to G," which were all tendered therewith on February 23, 1957, which was three months after she filed her Original Answer and her Original Counterclaim on November 12, 1956. The District Court did not rule on the said motion for four years, until on May 4, 1961, he overruled the said Motion and the Court of Appeals for the Sixth Circuit upheld his ruling, that the denial was because the District could not take jurisdiction of a Probate Matter.

In the case of *Rogers* v. *Girard Trust Company*, 159 F. 2d 239 (1947) from Circuit Court of Appeals, Sixth Circuit.

The Court of Appeals for the Sixth Circuit, reverses itself by the ruling in the within case.

In the case above cited it was a suit by the beneficiary of an estate against a trustee wherein the complaint alleged numerous breaches of trust, and it was an action for money damages in Ohio against the Trust Company a resident of Pennsylvania. The trustee filed its account of administration of the trust of the estate, with the Orphans Court of Philadelphia County, Pennsylvania. The petition filed with the account, contained an application for distribution of one-half of the corpus of the trust.

The beneficiary protested against the distribution in a letter addressed to the trustee but took no steps to intervene in the proceedings. The account was confirmed absolutely and the distribution ordered.

Several months later the beneficiary filed a petition in the Federal Court in Ohio, charging the Trust Company with negligence and with deliberate and willful acts of malfeasance claiming damages for various specific mismanagements of estate property and breaches of trust, etc.

No answer was filed by the Trust Company but they moved to dismiss the complaint on the ground that the Orphans Court had already assumed jurisdiction of the subject matter. Before the Court had ruled upon this Motion, The Trust Company moved for Summary Judgment, on the ground that no genuine issue existed as to any material fact, and that it was entitled to a Judgment as Matter of law. The Trust Company later withdrew its motion to dismiss and the beneficiary moved for leave to file an amended complaint, as there so here in the instant case.

The District Court denied the Motion for leave to file the amended complaint, and sustained the Trust Companies Motion for Summary Judgment.

No finding of fact or conclusions of law were made by the District Court.

The beneficiary contended that the District Court erred in refusing permission to file the amended complaint and in granting the Trust Companies Summary Judgment.

The Court of Appeals for the Sixth Circuit in that case sustained the beneficiaries contentions and held that "it was error for the District Court to deny the leave to amend and further that "it was also error to grant the Trust Companies Motion For Summary Judgment Reversed the Judgment of the District Court and remanded the case to the District Court. In the case of *Meredith* v. *City of Winter Haven,* 320 U.S. 227-235 (1943).

That was a case on Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of the District Court of the United States for the Southern District of Florida. This Court held in that case that:

> "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."
>
> "We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of an exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."
>
> "Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 ALR 1487, supra, did not free the federal courts from the duty of deciding questions of

state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. Wichita Royalty Co. v. City Nat. Bank, 306 U.S. 103, 83 L. ed. 515, 59 S. Ct. 420, supra; West v. American Teleph. & Teleg. Co. supra (311 U.S. 236, 237, 85 L. ed. 143, 144, 61 S. Ct. 179, 132 ALR 956); Fidelity Union Trust Co. v. Field, supra (311 U.S.) 177-180, 85 L. ed. 112-114, 61 S. Ct. 176; Six cos. of Cal. v. Joint Highway Dist. 311 U.S. 180, 188, 85 L. ed. 114, 117, 61 S. Ct. 186; Stoner v. New York L. Ins. Co. 311 U.S. 464, 85 L. ed. 284, 61 S. Ct. 336; Palmer v. Hoffman, 318 U.S. 109, 116-118, 87 L. ed. 645, 651, 652, 63 S. Ct. 477, 144 ALR 719. Even though our decision could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication."

"The judgment will be reversed and the cause remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

Reversed."

As in that Case, so in the instant case, Mrs. Smith, the Petitioner's case being within the jurisdiction conferred on the federal courts by Congress, was entitled to have such an adjudication of her tendered Amended Answer and Amended Counterclaim and under Rule 19 of the Rules of this Court, the Petition for a Writ of Certiorari should have been granted.

V. The Petitioner, Mrs. Smith, Was Denied Due Process Of Law Guaranteed By The Fourteenth Amendment To The Constitution Of The United States, When She Was Denied The Right Of A Trial In This Suit Filed Against Her On September 13, 1956

The Complaint in this case was filed by the joint administrators, on September 13, 1956, (consisting of 28 printed pages) against Patricia O'Brien-Smith, four years, and four and one-half months after the so-called Judgment of the Jefferson County Court was entered on March 5, 1952, and amended on May 1, 1952, in the O'Brien Estate, and in their Complaint the joint administrators raised the issue of the sale of Mrs. Smith's partnership interest in E. J. O'Brien & Company and its four subsidiaries, and made many misstatements of facts and figures in regards thereto, which Mrs. Smith denied and controverted which she had a legal right to do. Now Exhibit No. 1, to the Trust Companies' Complaint, was their pleading entitled "Their Account and Final Settlement of the Execution of Their Trust", (which consisted of 39 printed pages); it was made a part of the Complaint, just as much as if it had been written in it, making a total of 67 pages, which one of the joint administrators, **The Louisville Trust Company refused to sign or swear to** (A. "B", p 93a).

In the prayer of the Trust Companies' pleading under paragraph IV, they prayed that:

> 'IV. All of the questions and controversies herein, and all of the Administrators' rights and claims, and all rights and claims, if any, in respect of all of the questions and controversies and all other matters pertaining to the Estate, be finally judicially settled, determined and adjudged; and especially it be determined and adjudged that Patricia R. Smith is forever estopped against, and forever barred from, making any further claim against the Administrators (in either their individual capacities or in their capacity as Joint Administrators) for or on account of the

sale of Mr. O'Brien's Partnership Interest in E. J. O'Brien & Co. by the Compromise Settlement Agreement of November 5-15, 1935, or for or on account of their action in approving that Agreement and their acts and transactions in performance of the terms thereof." (See A. "B", pp 91a-92a).

Thus the joint administrators sought the approval of all of their acts and deeds in the entire administration of the O'Brien Estate.

In their Complaint, the joint administrators (1) made misstatements of facts and figures pertaining to the sale of Mrs. Smith's partnership interest in the E. J. O'Brien and Company and its four subsidiaries, which was made by them in 1935 (2) **they made many misstatements of facts pertaining to their numerous litigations which they filed and prosecuted on petitions and amended petitions which the Court of Appeals of Kentucky held did not state a cause of action because they did not comply with Section 429 of the Civil Code of Practice of Kentucky, for the final settlement of the O'Brien Estate in the Jefferson Circuit Court**; (3) **they made many misstatements of facts under the heading of "administrators' payments to Mrs. O'Brien now Smith, from Mr. O'Brien's Estate"**, which Mrs. Smith denied and controverted, and is legally entitled to a trial thereon, whether she is granted the right to surcharge and falsify the purported final settlements of accounts or not; (4) **the Joint administrators made many misstatements of facts and figures under the headings of Administrators' Receipts and Disbursements of Mr. O'Brien's Estate.** Under disbursements they deliberately made a misstatement of fact when they contended that the "difference between appraised value (of $452,418.73) and sale price ($418,000.00) of Mr. O'Brien's Partnership Interest in E. J. O'Brien & Company equalled $34,418.73, and they called that a disbursement"—Disbursement to who?

In the answer of Mrs. Smith to the Complaint, she denied that an appraisal was ever made of the partner-

ship interest or that the $34,418.73 was a disbursement to anyone, or that she had ever been informed about any such disbursement and that she is entitled to know whom it was paid to, and to require the Trust Companies to introduce proof in a trial thereon. (A. "B", p 39a).

In the answer and counterclaim filed by Mrs. Smith on November 12, 1956, all of the material facts as set forth in the Complaint, and the Joint administrators' purported final settlement of their accounts which they labeled as their Exhibit No. 1, to their Complaint, were denied and controverted by Mrs. Smith, and there were not any admissions in her pleadings which established the material facts. Mrs. Smith specifically made twenty-four (24) denials of so-called salient facts alleged in the Complaint of the Trust Companies, but more than that in the thirty-sixth paragraph of her Answer and Counterclaim she denied, "every other allegation of the Complaint wherein affirmative relief is sought against this defendant (petitioner)". (See Printed Transcript of Record A. "B", p 133a). When the Trust Companies stated that Mrs. Smith admitted any material allegations against her it is a blatant misrepresentation of the truth. (See the following pleadings filed for Mrs. Smith.

(1) "Answer and Counterclaim of Defendant, Patricia O'Brien-Smith with Jury Demand", filed on November 12, 1956, (A. "B", pp 121a-139a).

(2) "Defendant's (Mrs. Smith's) Motion (Filed) For Leave To File An Amended Answer and An Amended Counterclaim, Surcharging The Joint Administrators' Settlements—and On Bond Of The Estate Of John A. O'Brien, Deceased, With Exhibits "A" to "G", filed February 23, 1957, (A. "B", pp 164a-165a).

(3) "Defendant Patricia R. Smith's Amended Answer and Amended Counterclaim, Surcharging Joint Administrators' Settlements—And On Bond Of The Estate of John A. O'Brien, Deceased, With Six (6) Exhibits, "A", "B", "C", "D", "E", "F", and "G", Tendered February 23, 1957, (A. "B", pp 165a-224a).

(4) "Affidavit of Patricia O'Brien-Smith Filed in Opposition to 'Plaintiffs' Joint Administrators' Motion for Summary Judgment', and Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's Counterclaim", filed March 21, 1957, (A. "B", pp 342a-388a).

(5) "Defendant Patricia R. Smith's Reply to 'Administrators' Objections to Mrs. O'Brien-Smith's Motion for Leave to File Amended Answer and Amended Counterclaim,' Filed by Counsel for Defendant, Patricia R. Smith", filed on May 3, 1957, (A. "B", pp 413a-429a).

(6) "Defendant Patricia R. Smith's Reply to the 'Administrators' Motion to Strike Mrs. O'Brien-Smith's Affidavit (filed March 21, 1957) in Opposition to Administrators' Motion for Summary Judgment.' Tendered on August 16, 1959 (by mailing to Judge W. Wallace Kent by Registered Mail, Return Receipt Requested on August 15, 1959). Record of Case Not Returned to Clerk of the U.S. District Court in Louisville Until June 9, 1961," and filed as of June 9, 1961, (A. "B", pp 451a-471a).

(7) "Defendant's Supplemental Affidavit of Patricia O'Brien-Smith in Opposition to 'Plaintiffs' Joint Administrators' Motion for a Summary Judgment' and Second Response to the Joint Administrators' Reply to Mrs. O'Brien-Smith's First Counterclaim, Filed Herein on November 12, 1956, Tendered on August 27, 1959, with Thirty-five (35) Exhibits Attached Thereto", Filed Pursuant to Order dated August 28, 1959, (A. "B", pp 472a-1279a).

(8) "Defendant, Patricia O'Brien-Smith's (1) Objections To The Joint Administrators' Motion For Leave To File An Amended Reply; (2) Objections To The Joint Administrators' Amended Reply To Mrs. O'Brien-Smith's Counterclaim; and (3) Objections To The Joint Administrators' Amended Motion For a Summary Judgment To Dismiss Mrs. Smith's (First) Counterclaim," and attached thereto was, Defendant's Exhibits Nos. 36, 37, 38 and 39. Filed September 18, 1959, (A. "C", pp 1549a-1572a).

(9) "Defendant Mrs. O'Brien-Smith's Supplemental Reply to Rebuttal Argument of Joint Administrators'

on August 27, 1959, Pages 61 to 80 of Transcript of Hearings on Motions with Exhibits No. 40 and 41, "filed on October 2, 1959, (A. "C", pp 1573a-1600a).

(10) "Mrs. O'Brien-Smith's Motion For Leave To File Her Second Amended Answer and Her Second Amended Counterclaim, and Exhibits Numbers 42 through 75" (all of which was tendered therewith), filed on May 15, 1961, (A. "C", pp 1703a-1989a).

Mrs. Smith denies that there were any "records of any Judicial proceedings to which Mrs. Smith was a party", filed in this case, wherein Mrs. Smith admitted any of the material facts set out in the joint administrators Complaint or their settlement of accounts labeled Exhibit No. 1, thereto, or any other Exhibits filed by Mrs. Smith, or the joint administrators in this case; and the joint administrators have again deliberately misstated the facts to this Court, in their footnote or page 13 of their brief. As has already been stated in this Petition, **there was not any Transcript of Testimony of any proceedings from the Rescission suit in the O'Brien Estate, or from the joint administrators' two settlement suits filed in the O'Brien Estate, or their hearings in County Court in 1951 and 1952, on their purported final settlement of the O'Brien Estate, or from any other Court, filed in the within case, and there are not any shown on the Certified Copies of the Docket Entries from the District Court or the Court of Appeals, from which the entire and complete Transcript of Record was printed in this case, consisting of 2,625 pages in three volumes,** filed in this Court with Mrs. Smith's Petition for Writ of Certiorari, on January 16, 1965, to which the joint administrators have made all of their Transcript of Record references to in their brief, a copy of which they served on counsel for Mrs. Smith on February 16, 1965.

The flippant and frivelous quotation from the Court of Appeals' unpublished opinion denying the Petitioner Mrs. Smith a rehearing in this case, which the joint administrators have seen fit to quote three times in their

brief, is a clear example of the unreasonable, arbitrary and capricious, rulings that were administered in this case withal, a quality of flippancy and overdrawn levity tantamount to caprice stamps the Court of Appeals' rulings and opinion in this case, discernible only in reading the final opinion, which clearly showed that neither the District Court nor the Court of Appeals knew anything about the true and correct facts of this case, or the pleadings filed in this case, and they refused to apply the Kentucky law or the Kentucky Statutes.

The constitutional guaranty demands that law shall not be unreasonable, arbitrary, or capricious, *Nebbia* v. *People of State of New York, N.Y.*, 54 S.Ct. 505, 291 U.S. 502, 78 L.Ed. 940, 89 A.L.R. 1469; *North American Co.* v. *Securities and Exchange Commission,* C.C.A., 133 F. 2d 148, 154.

The joint administrators failed and refused to file a final settlement of their accounts of the O'Brien Estate, on March 1, 1936, when it was due to be filed, in violation of KRS 25.175, and they failed and refused to file one for a whole year before any litigation was started by the joint administrators in February 1937, by their filing of their first trumped-up settlement suit in the O'Brien Estate in the Jefferson Circuit Court, and for sixteen years, they failed and refused to file any kind of a settlement in County Court. Under the Statutes and laws of Kentucky, Mrs. Smith had the legal right to wait until May 1 1957, to **surcharge** and **falsify** the purported final settlement of the accounts of these joint administrators, of which was approved by the County Court on March 5, 1952, and amended on May 1, 1952.

Mrs. Smith's Writ of Certiorari clearly showed (1) that the Court of Appeals rendered a decision in this case which is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit, the Circuit Court of Appeals for the Fifth Circuit, the Circuit Court of Appeals for the Seventh Circuit and in conflict with its own

decision in the case of *Rogers* v. *Girard Trust Co.* in 1947, on the same matter, and she cited the cases which uphold this contention. See the cases of: *Griffith* v. *Bank of New York,* 147 Fed. (2d) 899, February 16, 1945; *Paul et al* v. *Girard Trust Co.,* 124 F. 2d 809, (1941); *Rogers* v. *Girard Trust Co.,* 159 F. 2d 239, (1947); and *Meredith* v. *City of Winter Haven,* 320 U.S. 228-231; 64 S.Ct. 7, at page 11, (1943). The Trust Companies' brief failed to show to the contrary. (See other cases cited in Writ of Certiorari, pp 157-164).

(2) Mrs. Smith's Writ clearly showed that the Court of Appeals decided an important Kentucky State question, on the final settlement of the accounts of the Joint administrators of the Estate of John A. O'Brien, in conflict with the applicable Kentucky law and Kentucky statutes governing the final settlement of the said estate. The Trust Companies' brief failed to show to the contrary.

(3) Mrs. Smith's Writ clearly showed that the Court of Appeals decision has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision and for the above reasons, under Rule 19, of the Rules of this Court, the Petition for a **Writ of Certiorari should be granted.**

(4) Further, Mrs. Smith's Writ of Certiorari clearly showed that the Court of Appeals denied Mrs. Smith due process and thereby decided a federal question, in a way in conflict with applicable decisions of this Court when it denied Mrs. Smith the right of a trial in this case.

From 1792 to date, there has been established by custom, statutes and precedent, a course of legal proceedings in the final administration of estates in Kentucky where there are no probate courts as such.

"Due Process of Law implies **the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or**

property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof every material fact which bears on the question of right in the matter involved." If any question of fact or liability be conclusively presumed against him, this is not due process of law. *Zeigler* v. *Railroad Co.*, 58 Ala. 599.

It is the right of every person, before he can be deprived of his property, to have a trial according to law; to have the same character of trial given by the same established rules of evidence and procedure as are applied in other cases under similar conditions. *San Jose Ranch Co.* v. *San Jose Land & Water Co.*, 58 P. 824, 825, 126 Cal. 322.

As applied to judicial proceeding, "due process clause" means party shall have his day in court. *U.S.C.A. Const. Amend. 14;* Mo. St. Ann. Const. Art. 2, Sec. 30. State ex rel. and to use of *Chicago Great Western R. Co.* v. *Public Service Commission* (Mo.) 51 S.W. (2d) 73, 77.

Due process of law means a course of legal proceedings which secures to every person a judicial trial before he can be deprived of life, liberty, or property. *Peerce* v. *Kitzmiller,* 19 W.Va. 564, 565; *White* v. *Crump,* 19 W.Va. 583, 595.

Law of the land, within Fourteenth Amendment, guaranteeing due process, includes those principles of procedure and equity which have become established. *Owens* v. *Battenfield* (C.C.A. Okla.) 33 F. (2d) 753, 757.

Due Process of Law implies the right to contradict by proof every material fact which bears on questions of right involved. *Broadway* v. *Alabama Dry Dock & Shipbuilding Co.*, 20 So. 2d 41, 50, 246 Ala. 201.

Due Process of Law guarantees that every person have protection of his day in Court and the benefit of the general law of his State. So, when Mrs. Smith was denied the right to have a trial on the issues raised by the

denials by Mrs. Smith to the allegations of the Compiaint, and the joint administrators purported final settlements of accounts consisting of 67 printed pages which they made a part of their Complaint by labeling it Exhibit No. 1, thereto, with exhibits copied therein, she was denied Due Process of Law.

Mrs. Smith had a legal right to have a trial on the issues thus raised by her denials in her original Answer filed on November 12, 1956, regardless of whether she would be permitted to surcharge and falsify the purported final settlement of accounts of the joint administrators which she sought to do by her tendered amendment.

The issues involved in this case involve far more than the issue of the sale of Mrs. Smith's partnership interest in the Edward J. O'Brien & Company and its four subsidiaries. It involves the entire administration of the O'Brien estate for thirty-one (31) years, by the joint administrators and their mis-management of the entire estate and their mis-appropriation of stocks and securities and cash funds, belonging to Mrs. Smith, the sole beneficiary of the estate, (see Writ of Certiorari pp 73-77).

Further, when Mrs. Smith was denied the right to file her exceptions to the items in the purported final settlement of the accounts of the estate of John A. O'Brien filed by the Joint administrators which she deemed invalid and illegal, and to have a trial thereon, and deprived of the right of presenting every material fact to test the validity of the items in the settlement, she was further denied her day in Court and the benefit of the Kentucky law, as well as $73,756.98 cash, plus interest, of her personal property without due process of law, and other valuable assets as set forth herein.

In the case of *National Sur. Corp.* v. *Sharpe,* 59 S.E. 2d 593, 597, 232 N.C. 98, it held:

> "In its procedural aspects the constitutional guaranty of 'due process of law' assures to every person his day

in court and means that there can be no proceeding against life, liberty or property without observance of those general rules established in American system of jurisprudence for the security of private rights."

See also the cases of, *Brown* v. *Levee Com'rs,* 50 Miss. 468; *Embury* v. *Conner,* 3 N.Y. 511, 517, 53 Am. Dec. 325; *Davidson* v. *New Orleans,* 96 U.S. 104, 24 L.Ed. 616; *People* v. *Skinner, Cal.,* 110 P. 2d 41, 45; *State* v. *Rossi,* 71 R.I. 284, 43 A. 2d 323, 326; *Direct Plumbing Supply Co.* v. *City of Dayton,* 138 Ohio St. 540, 38 N.E. 2d 70, 72, 137 A.L.R. 1058; *Stoner* v. *Higginson,* 316 Pa. 481, 175 A. 527, 531; *McKenna* v. *McKenna,* 70 Ill. App. 340; *Ryan's Furniture Exchange* v. *McNair,* 162 So. 483, 120 Fla. 109; *U.S.C.A. Const. Amend. 14;* Mo. St. Ann. Const. art. 2, Sec. 30; *Peerce* v. *Kitzmiller,* 19 W Va. 564, 565; *Owens* v. *Battenfield* (C.C.A. Okl.) 33 F. (2d), 753, 757; *Quimby* v. *Hazen,* 54 Vt. 132, 139.

In the case of *Staley* v. *Safe Deposit & Trust Co. of Baltimore,* 56 A. 2d 144, 148, 189 Md. 447, it held:

> "A judgment in personam without personal service or appearance, or a judgment in rem without jurisdiction over the res, is not 'due process of law' and is not entitled to full faith and credit in another state."

A County Probate Court as such in Kentucky does not have, and lacks jurisdiction by statute or otherwise to render an *in personam* or *in rem judgment* and never has since Kentucky became a State (Commonwealth) on June 6, 1792.

The Petitioner, Mrs. Smith, attaches hereto and files herewith the Opinion of the District Court filed and entered in the within case on March 4, 1961, which is marked Appendix "E" and consists of pages 1a through 23a. Also Mrs. Smith attaches and files herewith her Petition for Rehearing on the District Court's Opinion, marked Appendix "F" consisting of pages 1a through 46a, filed on

April 3, 1961 which we respectfully request this Court to consider.

If this Court denies this Petition for Rehearing, by approving the fallacious opinion of the District Court (found in Appendix "E" herein), the Rule of Law established by the case of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64; 82 L. ed. 1188; 58 S. Ct. 817; 114 ALR 1487, will be completely overthrown, it will create chaos and untold problems in the final settlements of estates in Kentucky by these two trust companies and all other personal administrations.

We request this Court to follow the rule of law in the *Erie* v. *Tompkins* case, *supra*, according to the law and statutes in Kentucky governing the final settlements of the accounts of administrators of estates in Kentucky and to grant this Petition for Rehearing.

CONCLUSION

Petitioner Mrs. Smith, never had any trial in this lawsuit which was filed against her by the two Trust Companies on September 13, 1956, and she did not file any exceptions to the purported final settlements of the accounts of the Joint Administrators of the O'Brien Estate, she was denied the right to have a trial on the merits of the validity of the claims or items contained in the purported final settlement of the accounts of the Joint Administrators of the O'Brien Estate.

By the denial to Mrs. Smith of the right to have a trial in this lawsuit filed against her, the District Court, and the Court of Appeals for the Sixth Circuit, deprived her of her rights, and sustained a denial of Due Process guaranteed by the Fourteenth Amendment to the Federal Constitution.

For the foregoing reasons, as well as for the reasons set out in the Petition For Writ of Certiorari, it is respectfully submitted that this Petition For Rehearing should be granted, and that the Order of this Court of

March 15, 1965, denying the writ of certiorari be vacated, and that the Petition For Writ of Certiorari be granted.

WALTER B. SMITH
800 Columbia Building,
Fourth and Main Streets,
Louisville, Kentucky
Counsel for Petitioner

May 8, 1965.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

WALTER B. SMITH
Counsel for Petitioner

APPENDIX "E"

Opinion of the United States District Court for the Western District of Kentucky. Filed on March 4, 1961 and

APPENDIX "F"

Defendant Patricia R. Smith's Petition for Rehearing on Opinion of The United States District Court for the Western District of Kentucky. Filed on April 3, 1961.

APPENDIX E

OPINION FILED AND ENTERED ON MARCH 4, 1961.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
At Louisville

THE LOUISVILLE TRUST COMPANY, and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, - - - - *Plaintiffs,*

vs. CIVIL ACTION NO. 3218

PATRICIA R. SMITH, - - - - - - *Defendant.*

This action was commenced in the Circuit Court for Jefferson County, Kentucky, Chancery Branch, First Division. It was removed to this Court by the defendant who is the widow of the decedent, John A. O'Brien. John A. O'Brien died on January 1, 1934, leaving more than one testamentary instrument. At the time of his death John A. O'Brien was one of the owners of Edward J. O'Brien & Company. There was a dispute between the defendant, the widow of John A. O'Brien, and members of the O'Brien family as to the validity of the testamentary instruments found after the death of John A. O'Brien; and a further dispute as to the value of his interest in the Edward J. O'Brien & Company; the effectiveness of an insurance trust; and other matters. After extensive negotiations a settlement agreement was entered into between the defendant and the other parties involved. As a result of such settlement the defendant received several hundreds of thousands of dollars. One year and a few months after the settlement agreement had been executed the defendant

became dissatisfied and litigation was commenced. In the interim period there have been a number of lawsuits all pointed toward the determination of the issue of fraud in the settlement between the defendant and the other interested relatives and the Administrators. A list of the cases known to this Court at this time is shown below.[1]

In the course of the years defendant has used various means to disqualify the Federal Judges in Kentucky, and the writer was designated to hear the cause.

There are before us two motions: plaintiffs' motion for a summary judgment on defendant's original counterclaim, and defndant's motion to file an amended counterclaim.

In essence plaintiffs' motion for a summary judgment on the defendant's original counterclaim is based upon the theory that the defendant is barred, by the statute of limitations and by the rules of res judicata, from raising the issues presented by her original counterclaim. The original counterclaim embodies a charge of fraud against the administrators arising out of the original settlement of the rights of the estate in the Edward J. O'Brien & Company. The plaintiffs' objection to the motion for leave to file an amended counterclaim is based upon the statute

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1 (1) Administrators' Suit to Settle Mr. O'Brien's Estate, in Jefferson Circuit Court (Louisville, No. 250,301, *Louisville Trust Co. et al v. Patricia R. O'Brien et al* (February 18, 1937-May 16, 1950):

Reported decisions: *Smith v. Burnett, Judge,* 300 Ky. 249, 188 S.W. 2d 480—Mrs. O'Brien-Smith's original action in Court of Appeals of Kentucky for Writ of Prohibition against Judge Burnett further proceeding in above Administrator's Settlement Suit; writ denied June 15, 1945;

First Appeal of Administrators' above Settlement Suit, *Smith v. Louisville Trust Co. et al,* 308 Ky. 189, 213 S.W. 2d 987 (June 8, 1948; Rehearing Denied October 29, 1948);

of limitations and also upon the theory that this Court has no probate jurisdiction which would permit it to consider the amended counterclaim in which the defendant asserts the right to surcharge the account of the plaintiff administrators in the Estate of John A. O'Brien, deceased.

The original action by the Administrators is based upon an order of the County Court of Jefferson County, Kentucky which plaintiffs claim settled their final account, creating in them a right to recover from the defendant an amount equal to the approved expenses and fees in excess of the monies in the hands of the administrators. All other funds of the estate have been previously expended in a manner which the plaintiffs claim was approved by the Jefferson County Court, or distributed to the defendant.

Reference to previous litigation will be made only when it is pertinent to the determination of the motions before the Court in this case.

Second Appeal of Administrators' Settlement Suit, *Louisville Trust v. Smith,* 313 Ky. 15, 230 S.W. 2d 64 (May 16, 1950).

(II) Mrs. O'Brien-Smith's Rescission Suit, to rescind her November 5-15, 1935, Compromise Sale of Mr. O'Brien's partnership interest in E. J. O'Brien & Co., in Jefferson Circuit Court No. 250,536, *Patricia R. O'Brien v. Edwin J. O'Brien et al* (March 10, 1937-May 8, 1944):

Reported decisions:

O'Brien v. O'Brien, 294 Ky. 793, 172 S.W. 2d 595; S.C. cert. den. 321 U.S. 767 (January 31, 1944); Rehearing Denied 322 U.S. 769 (May 8, 1944).

(III) Mrs. O'Brien-Smith's $822,035.04 Damage Suit against Administrators, re her November 5-15, 1935, Compromise Sale of Mr. O'Brien's above partnership interest, in Federal Court (Louisville) No. 870, *Patricia R. Smith v. Louisville Trust Co. et al* (March 16, 1945-March 10, 1949):

Statutes of Limitations of Kentucky distinguish between different types of actions. The Administrators rely upon *§ 413.090 Kentucky Revised Statutes (Carroll's Ky. Stats. § 2514):*

"413.090 (2514) Action upon judgment, written contract or bond; fifteen year limitation. Except as provided in KRS 413.110, 413.200, 413.210, 413.220, 413.230 and 413.240, the following actions shall be commenced *within fifteen years* after the cause of action first accrued: • • •

(2) An action upon a recognizance, bond or written contract.

(3) An action upon the official bond of a • • • personal representative, guardian, committee, or trustee appointed by a court or authority of law.

(4) An action • • • upon a bond or obligation for the payment of money or property or for the performance of any undertaking."

§ 413.160 Kentucky Revised Statutes (Carroll's Rev. Stats. § 2522:

"413.160 (2522) Actions not provided for by statute; ten year limitation. An action for relief, not provided for by statute, can only be commenced *within ten years* after the cause of action accrued."

Reported decisions:

Commonwealth v. Shilladay, 311 Ky. 478, 224 S.W. 2d 685—Indictments returned on April 17, 1948 of Accountants (representatives of Arthur Young Company, accounting firm) who audited E. J. O'Brien & Co.'s books for use in the above $822,035.04 Federal Court Damage Suit; law certified November 18, 1949.

Above Damage Suit dismissed on March 10, 1949, without prejudice, upon Mrs. O'Brien-Smith's Motion—after Mrs. O'Brien-Smith filed her Affidavit of Personal Bias (on May 19, 1947), against Judge Shelbourne who disqualified himself (May 29, 1947), and Judge Freed of Cleveland was designated (June 26, 1947) to try case.

§ 413.120 Kentucky Revised Statutes (Carroll's Ky. Stats. §§ 2515; 2518):

"413.120 (2515; 2518) Actions to be brought within five years. The following actions shall be commenced *within five years* after the cause of action accrued: • • •

(7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated. • • •

(12) An action for relief or damages on the ground of fraud or mistake."

§ 413.130 Kentucky Revised Statutes (Carroll's Ky. Stats. §§ 2518; 2519; 2520):

"413.120 (2518; 2519; 2520) When certain actions in KRS 413.120 accrue; regulations for. • • •

(3) In an action for relief or damages for fraud or mistake, referred to in sub-section (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced *within ten years* after the time of making the contract or the perpetration of the fraud."

and *§ 413.230 Kentucky Revised Statutes (Carroll's Ky. Stats. §2550):*

(IV) Proceedings in Administrators' Declaratory Judgment and Settlement Suit in Jefferson Circuit Court, No. 313-655, *Louisville Trust Co. et al v. Patricia R. Smith et al* (March 31, 1949-March 6, 1951):

Reported decisions:
Smith v. Louisville Trust Co., 262 S.W. 2d (Ky.) 479 (November 20, 1953).

(V) Mrs. O'Brien-Smith's suit to enjoin above Suit No. 313,655, of Administrators for Declaration of Rights and Settlement, Jefferson Circuit Court No. 313,986, *Patricia R. Smith v. Louisville Trust Co. et al* (April 21, 1949-March 6, 1951):

Reported decision:
Smith v. Louisville Trust Co., 237 S.W. 2d (Ky.) 836 (March 6, 1951; Rehearing Denied April 17, 1951).

"413.230 (2550) Sureties who are discharged after five years. A surety for an executor, administrator, guardian or curator, * * * shall be discharged from all liability to a distributee, devisee or ward when *five years have elapsed* without suit after the cause of action accrued, and after the devisee, distributee or ward attained full age. * * *"

Thus it is necessary for the court to determine when the defendant's cause of action for the alleged fraud arose and the nature of the cause of action which she asserts. It must be obvious, from the report of the first litigation, *O'Brien v. O'Brien*, 294 Ky. 793; 172 S.W. 2d 595 (1943); S.C. Cert. Den. 321 U.S. 767 (1944), in which the defendant pursued her claim against the O'Brien family and the administrators through the Court of Appeals of Kentucky and followed an adverse decision by that court with an application for a Writ of Certiorari to the Supreme Court of the United States, which was denied, that the defendant knew she had or could assert a claim of fraud against the plaintiffs here, at the time she instituted her original action for fraud in 1937 since she claimed fraud on the part of all parties concerned in that case. At page 609 of 172 S.W. 2d, the Court of Appeals of Kentucky disposed of the plaintiff's case as follows:

"In conclusion, it has not been overlooked that the burden rested upon the plaintiff to show a failure to reveal material facts in the settlement, which is essentially to prove fraud and deceit. But the degree of proof in cases of this kind varies inversely with the knowledge of the matters involved and the trust reposed in the other by the party challenging the settlement. Thus where both parties are acquainted with the part-

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(VI) Administrators' Final Settlement of Estate in Jefferson County Court (Louisville), No. 24, 146, In re *Estate of John A. O'Brien*, deceased, for final settlement of Estate of John A. O'Brien (June 21, 1950-May 1, 1952):

nership affairs and neither reposed special confidence in the other, the burden of proof is greater than where one did not have full knowledge of the business and relied upon his partner. In such a case the settlement is deemed less conclusive. *Chambers v. Johnston,* 180 Ky. 73, 201 S.W. 488; 40 Am. Jur., Partnership, § 131. We have the peculiar situation here of innocence by the challenger of the conditions of the business, who, however, had no confidence in the representations of those with whom she was dealing and who had competent and trustworthy counselors. Taking into consideration all these factors as well as the formidable ones mentioned in the beginning concerning the attitude of those with whom the plaintiff had dealt, we are of the opinion there was a fair and reasonable settlement and contract of purchase and sale."

The present action was commenced in the Circuit Court for Jefferson County, Kentucky on September 13, 1956. It appears clear to this Court that any claim of fraud against the plaintiffs is barred by *Kentucky Revised Statutes, § 413.120, supra,* which requires actions for damages on the ground of fraud or mistake to be commenced within five years after the cause of action accrued even though *§ 413.130 KRS* is applied which section provides that the cause of action shall not be deemed to have accrued until

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Reported decisions:

Smith v. Shamburger, Judge, 314 Ky. 850, 238 S.W. 2d 844—Mrs. O'Brien-Smith's Original Action in Court of Appeals of Kentucky to stay Judge Shamburger from proceeding in Jefferson County Court for the above final Settlement of John A. O'Brien Estate (January 26, 1951; Rehearing Denied May 11, 1951).

Mrs. O'Brien-Smith then commenced (October 1, 1951) Removal Proceedings in Federal Court (Louisville), No. 2224, to remove to Federal Court Administrators' Jefferson County Court proceedings for Final Settlement of Mr. O'Brien's Estate; after Judges Shelbourne and Swinford had disqualified themselves to sit.

the discovery of the fraud or mistake and continues *inter alia*:

> "However, the action shall be commenced *within 10 years* after the time of making the contract or the perpetration of the fraud."

Since the defendant was aware of her claim of fraud in 1937 the action is barred by *Kentucky Revised Statutes*, § *413.160* which requires that actions not provided for by statute shall be commenced within ten years, and by § *413.090* KRS which requires actions upon official bonds to be commenced within fifteen years. Clearly, twenty years has passed from the time of Mrs. Smith's discovery of the alleged fraud to the time of the commencement of this action unless she can amend her counterclaim and surcharge the account of the administrators. She cannot sue the administrators as principals or as sureties being barred by the statutes previously cited, which allow her only five years after the cause of action accrues.

In the opinion of this Court the original counterclaim filed by the defendant is barred by the Statute of Limitations for the reasons set forth above.

In addition to the plaintiffs' claim that the matters complained of in the defendant's cross-complaint are barred as being res judicata. It being their theory that all the claims of fraud now asserted were disposed of in the original litigation between this defendant, as plaintiff, and the O'Briens and these plaintiffs as defendants, *Patricia R. O'Brien v. Edwin J. O'Brien et al*, No. 250, 536, 294 Ky. 793, 172 S.W. 2d 595, Cert. Denied 321 U.S. 767. A review of that decision and of the counterclaim in the instant case, supported by the voluminous briefs filed by the defendant's counsel, persuades this Court that the rule recently laid down by the Court of Appeals for this Circuit in *Davis v. McKinnon & Mooney*, 266 F. 2d 870, 873 (1959), supported by other cases to the same effect, *Bernhard v. Bank Of*

America National Trust & Savings Associations, 19 Cal. 2d 807, 122 P.2d 892; and *Hays v. Sturgill*, 302 Ky. 31, 193 S.W. 2d 648, 164 A.L.R. 868, should be applied here:

> "• • • Bernhard v. Bank of America National Trust & Savings Association, 19 Cal. 2d 807, 122 P. 2d 892, is an excellent discussion of the entire question. The court declares, 122 P. 2d at page 894:
>
> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. Coca Cola Co. v. Pepsi Cola Co., supra (6 W.W. Harr. 124, 36 Del. 124, 172 A.260). See cases cited in 24 Am. & Eng. Ency., 2d Ed., 731; 15 Cinn. L. Rev. 349, 351; 82 Pa. L. Rev. 871, 872. He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. *Ibid.*
>
> There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
>
> "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. See 7 Bentham's Works, Bowring's Ed., 171. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. Coca Cola Co. v. Pepsi-Cola Co., supra; Liberty Mutual Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506; Atkinson v. White, 60 Me. 396; Eagle, etc. Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490; Jenkins v. Atlantic Coast Line R. Co., 89 S.C. 408, 71 S.E. 1010; United States v. Wexler, D.C., 8 F.2d 880. See Good Health Dairy Products Corp. of Rochester v. Emery,

275 N.Y. 14, 9 N.E. 2d 758, 112 A.L.R. 401. The commentators are almost unanimously in accord. 35 Yale L. J. 607; 9 Va.L.Reg. (N.S.) 241; 29 Ill. L.Rev. 93; 18 N.Y.U.L.Q.R. 565, 570; 12 Corn. L.Q. 92. The courts of most jurisdictions have in effect accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. See cases cited in 35 Yale L.J. 607, 610; 9 Va.L. Reg. (N.S.) 241, 245-247; 29 Ill. L. Rev. 93, 94; 18 N.Y.U.L.Q.R. 565, 566, 567; 34 C.J. 988, 989. * * * The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries."

The above rule would bar the defendant from asserting the claims set forth in her cross-complaint if the present plaintiffs had not been parties to the original litigation, but the fact is that they were parties to the original litigation and the claims asserted are therefore res judicata. Thus the plaintiffs are entitled to a summary judgment as to the original counterclaim on two grounds: (1) claims asserted are barred by the statute of limitations, and (2) the claims asserted are barred by application of the rule as to res judicata.

There remains to be determined whether the defendant should be premitted to file an amended counterclaim surcharging the account of the plaintiffs. It is axiomatic that the District Courts of the United States in such districts as this have no jurisdiction over probate matters. *Markham v. Allen*, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256; *Harris v. Zion Savings Bank & Trust Co.*, 317 U.S. 447, 63 S.Ct. 354, 87 L.Ed. 390, 51 Am. Banks Rep. N.S. 825, rehearing denied 318 U.S. 799, 63 S.Ct. 659, 87 L.Ed. 1163; *Spears v.*

Spears, 162 F. 2d 345 (C.A. 6, 1947), Cert. Den. 332 U.S. 768, 68 S.Ct. 78, 92 L.Ed. 353. This is so clear that citations should be unnecessary.

The amended counterclaim which defendant desires to file, if heard by this United States District Court would require the Court to determine the accuracy of the accounts filed by the administrators, a function purely probate in nature, confided to the State Courts of Kentucky, and which function this United States District Court is barred from performing under the cases cited above.

In any event the right of the defendant to surcharge an account must depend upon whether the account filed was a final account, which it was so labeled and whether the defendant took part in the proceedings in connection with the settlement of that account as required by the Kentucky Statutes. *Logan's Administrator v. Troutman's Executor*, 10 Ky. 66; *Briscoe's Distributees v. Brady, Adm.*, 22 Ky. 134; *Bell v. Henshaw*, 91 Ky. 430, 15 S.W. 3; *Turley's Admr. v. Barnes*, 103 Ky. 127; *Welch v. Lewis, et al.*, 104 Ky. 531, 47 S.W. 454; *Harper v. Lamb*, 202 Ky. 771, 261 S.W. 280, *Dees' Adm'r. v. Dees' Ex'r.*, 249 Ky. 650, 61 S.W. 2d 301.

An examination of the file and consideration of the concessions of defendant's counsel, made on the argument of this case, show that the paper labeled "Final ACCOUNT" filed by the plaintiffs with the Jefferson County Court was filed with the County Court on June 21, 1950. In that account the administrators asked approval of their actions as administrators and requested the County Court to determine, adjudge and fix the fair and reasonable amounts for attorney fees and administrators' compensation. The defendant filed motions for extensions of time within which to file exceptions to the final account which extensions were granted, and objections to consideration of the settlement. The denial of the objections was appealed. Defendant filed a mandamus proceeding in the Kentucky Court of Appeals

to restrain the County Court from proceeding with a settlement of the final account; *Smith v. Shamburger, Judge,* 314 Ky. 850, 238 S.W. 2d 844; she attempted to remove the settlement proceedings to this United States District Court; she took all possible steps to prevent the settlement of the account, except that she did not file any actual exceptions challenging the propriety of the accounting for receipts and disbursements or the other actions of the administrators as set forth in the final account. It would appear that she had no objection to such accounting, as such.

On March 5, 1952, the final account was settled and the administrators were discharged and released from further liability under their bonds. This judgment of March 5, 1952, was amended on May 1, 1952, to authorize the administrators to recover from the defendant any over-payments, made by the administrators to the defendant. No appeal was taken from this judgment. The judgment and the amendment thereto are set forth in the margin to show the final effect thereof.[2]

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[2] **JUDGMENT OF THE JEFFERSON COUNTY COURT, LOUISVILLE, KENTUCKY OF (March 5, 1952.)**

This cause came on to be heard upon:

(1) The prayer of The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased (for brevity, hereafter called administrators), contained in "Their Account and Final Settlement of the Execution of Their Trust", filed herein June 21, 1950, for (a) The confirmation and approval of their Accounts, and their discharge and release from liability upon their bonds; (b) the determination of their compensation as administrators, and the fees for the legal services of their counsel; (c) The determination of the validity of, and, if valid, to whom are payable, the bequests in the will of John

Under Kentucky Law there are two ways to challenge the settlement of the final account of an administrator. It must be done by appeal if the person challenging has taken part in the proceeding leading to the approval of the account. *Bell v. Henshaw*, 91 Ky. 430, 15 S.W. 3 (1891); *Dees' Adm'r. v. Dees' Ex'r.*, 249 Ky. 650, 61 S.W. 2d 301 (1933); *Caplinger v. Pritchard*, 136 Ky. 349, 124 S.W. 352 (1910). If the challenging party has not participated in the proceeding leading to the judgment settling the final account then the account may be surcharged at any time within five years in an appropriate action. § *413.120 KRS.*

The judgment approving the final account as stated above was entered on March 5, 1952, it was amended on May 1, 1952.

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

A. O'Brien, deceased; (d) The settlement of questions and controversies between the Administrators and Patricia R. Smith, with respect to any claims that she makes against the Administrators; and (e) The recovery from Patricia R. Smith of any sum, or sums, necessary to pay (i) the administrators' compensation, (ii) the fees for their counsel, and (iii) expenses of administration, and for which the balance of the Estate's funds in the hands of the Administrators is insufficient;

(2) The evidence with respect to the Administrators' Final settlement, heard on July 12, December 17, 18, 19, 28, 1951, and January 2, 1952, by and before the Special Commissioner, which was reduced to writing, and, with the vouchers therefor, returned to, and filed in, this Court on January 7, 1952;

(3) The written Report dated January 5, 1952, and the written Supplemental Report dated January 7, 1952, made by the Special Commissioner, returned by him to the County Court, and endorsed by the Clerk thereof as filed therein at 9:08 A M. on January 7, 1952; and

We must determine whether the defendant had a right to surcharge the account of the administrators after final approval or whether her remedy was by appeal. It appears from the record that the defendant participated, to a substantial extent, in the proceeding leading to approval of the final account by using every remedy available to prevent the consideration and determination of the final account filed by the plaintiff administrators, including the filing of a mandamus action in the Court of Appeals of Kentucky, *Smith v. Shamburger, Judge*, 314 Ky. 850, 238 S.W. 2d 844 (1951).

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

the confirmation thereof by the Court on January 7, 1952;

(4) The Order dated January 29, 1952, allowing to A. Scott Hamilton, Special Commissioner, $2,000 as his fee as Special Commissioner, and to be taxed as a part of the court costs incident to this proceeding;

(5) Patricia R. Smith's Motion filed January 31, 1952, (a) To set aside the Court's Order of January 7, 1952, confirming the written Report and Supplemental Report of the Special Commissioner; and (b) to extend the time to April 4, 1952, to file Exceptions to the "so-called Final Settlement of this Estate and to the Commissioner's Report and Supplemental Report filed herein on January 7, 1952"; and the Court's Order thereon, and entered herein, dated January 31, 1952;

(6) The exceptions filed March 3, 1952, by Messrs. Oldham Clarke and Irvin Marcus (on behalf of their respective firms), to so much of the Special Commissioner's Report as allowed them only $10,000 for their services to the Administrators;

(7) Patricia R. Smith's various objections, protests, and motions for postponements and for extensions of time, (A) In which (i) "to file her exceptions and answer, or plead herein", and the affidavits filed in

In disposing of the mandamus action the Court of Appeals of Kentucky at page 848 of 238 S.W. 2d, stated as follows:

"In petitioner's argument in her briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court: (1) A settlement suit, filed April 21, 1949, and (2) an appeal from the County Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former Judge of Jefferson County Court, directing the Co-Administrators to settle the estate. There has been no final disposition of either of these cases. It would

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JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

support thereof containing an express promise therein that "if given time (to) proceed with diligence and dispatch to prepare exceptions . . . and file same in this settlement"; (ii) "to plead or file her exceptions and an answer herein" (July 3, 1950); and (iii) "for the filing of exceptions and objections and answer thereto" (August 7, 9, September 8, 1950); (B) Motion to strike objections, motion for reconsideration, and motion to require "that time be extended for the filing of exceptions and objections, and answer" (August 22, September 1, 8, 1950); (C) Orders of this Court that the Settlement filed by the Administrators "is a Final Settlement of their Accounts as Co-Administrators" (September 8, 1950), and that Patricia R. Smith's Objections and Motions be overruled, and she be given Exceptions thereto (September 8, 1950;) and (D) Patricia R. Smith's Motion that no proof be heard (July 12, 1951); her objections to Hearing of Settlement (December 17, 1951); her Motion to Quash Return and Summons to testify (December 28, 1951); her Motion to set aside Special Commissioner's Report and Supplemental Report (January 31, 1952); and her Motion "to extend the time . . . to file exceptions to the so-called final settlement of the estate and to the Commissioner's Report

seem, however, that the filing of the accounting of the Co-Administrators in the County Court bestows upon the latter complete jurisdiction to finally determine all issues now in dispute. If those items now the subject of controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement.

"Admitting, for the sake of argument, but by no means concluding that the County Court is acting erroneously in this case, it cannot be said that petitioner will suffer irreparable damage, or any damage, as a result of any order entered by or about to be made by the County Court. However, assuming that certain errors have been or will be committed by the County Court in winding up this estate, *petitioner can obtain adequate relief therefrom by an appeal to the Circuit Court.*" (emphasis supplied)

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

and Supplemental Report thereon" (January 31, 1952); and

The various Orders entered thereon by this Court, and by the United States District Court for the Western District of Kentucky (In Mrs. Smith's removal of this proceeding from the Jefferson County Court to the District Court of the United States for the Western District of Kentucky), to the end that former interlocutory orders of this Court, if found to be inadvertent or erroneous, could still be corrected before Final Judgment is entered in the Settlement of the John A. O'Brien Estate;

The Court being advised;

It is now ordered, adjudged and decreed, as follows, to-wit:

FIRST: The Special Commissioners' Report and Supplemental Report, filed on January 7, 1952, were laid over for Exceptions not only until the first day of the

From the above language it would appear that the Court of Appeals was satisfied that the defendant beneficiary should be left to her remedy by appeal in her challenge to the final account filed by the administrators.

After the Court of Appeals determined the mandamus action supra, defendant attempted to remove the probate proceeding to this Court. This Court remanded the settlement proceedings to the Jefferson County Court. Thereafter, and on January 31, 1952, the defendant filed a petiton for an extension of time in which to file exceptions to the final settlement of John A. O'Brien, deceased. No exceptions were actually filed and on March 5, 1952, the Jefferson County Court entered its final judgment approving the final settlement, and on May 1, 1952, its amended judgment.

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

next Term of Court following their filing; to-wit: Monday, February 4, 1952, but, upon the Motion of Patricia R. Smith, she was given until March 3, 1952, to file Exceptions to the Special Commissioner's Settlement of the Accounts of the Administrators; and the case was continued to March 3, 1952, for that purpose.

On March 3, 1952, herein "to be known as the date of hearing", Patricia R. Smith did not file any Exceptions, but Messrs. Oldham Clarke and Irvin Marcus filed Exceptions on behalf of their respective firms; and the case was passed to March 4, 1952, upon which date the entire case came on for hearing, and was heard by the Court.

SECOND: The Exceptions filed by Messrs. Oldham Clarke and Irvin Marcus (on behalf of their respective firms), to so much of the Special Commissioner's Report as recommended only $10,000 be paid to them for their services, be, and the same hereby are, sustained; and they are allowed the sum of $15,000 as compensation for their services to the Administrators during the period March 12, 1937, to June 20, 1950.

In connection with the claim of fraud arising out of the compromise settlement of November, 1935, the Jefferson County Court disposed of this issue in its judgment as follows:

"SIXTH: Patricia R. Smith has *no* claim against the Administrators in either their individual capacities or in their capacities as Joint Administrators, for or on account of the sale of John A. O'Brien's partnership interest in E. J. O'Brien & Co., by the Compromise Settlement Agreement of November 5-15, 1935, or for, or on account of, the Administrators' action in approving that Agreement and their acts and transactions in perform-

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JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

THIRD: The Special Commissioner's Report and Supplemental Report (except as modified in Paragraph SECOND of this Judgment), with all the evidence heard by him and the vouchers filed by the Administrators, be, and the same hereby are, approved and confirmed; are adopted as this Court's Settlement of the Accounts of the Administrators; and are ordered to be recorded in the records of this court.

FOURTH: The legacies given by John A. O'Brien in his Will of July 1, 1933 (a) of $1,000 to the College of Arts & Sciences of Georgetown University, of Washington, D. C., and (b) of $5,000 to the Catholic Bishop of the Diocese in which he was living at the time of his death, have been paid in full; and the Administrators are released and discharged from any liability to pay those legacies, or either of them or any part thereof.

FIFTH: The compensation to the Administrators for their services in administering the John A. O'Brien Estate, and the fees for the legal services of Messrs. Allen, McElwaine, Dinning & Clark, Davis, Boehl, Viser & Marcus, and Bullitt, Dawson & Tarrant, and of A. Scott Hamilton, Special Commissioner, be, and the same hereby are fixed at the following sums set opposite their respective names, and those sums are hereby allowed to them.

ance of the terms thereof; which acts are hereby specifically approved and confirmed."

No appeal was taken from this final judgment.

While we recognize that under Rule 15, the right to amend should be freely extended, *Robbins v. Jordan*, 181 F. 2d 793, 86 U.S. App.D.C.304 (1950); *Kerrigan's Estate v. Joseph E. Seagram & Sons*, 199 F.2d 694 (C.A. 3, 1952) *Fli-Fab. Inc. v. U.S.*, 16 F.R.D. 553, (D.C., R.I., 1954), nevertheless this right should not be extended to a litigant when the

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JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952. CONTINUED FROM THE PRECEDING PAGE.

The Administrators are authorized and directed to pay to them (out of the assets of the John A. O'Brien Estate) such sums, which are hereby allowed in the Settlement of the Administrators' Accounts, to-wit:

The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased	$23,756.98
Oldham Clarke and Irvin Marcus, for the benefit of their respective law firms (Allen, McElwaine, Dinning & Clarke and Davis, Boehl, Viser & Marcus).....	15,000.00
Bullitt, Dawson & Tarrant, and Davis, Boehl, Viser & Marcus).....	35,000.00
A. Scott Hamilton, Special Commissioner....	2,000.00

SIXTH: Patricia R. Smith has no claim against the Administrators in either their individual capacities or in their capacities as Joint Administrators, for or on account of the sale of John A. O'Brien's partnership interest in E. J. O'Brien & Co., by the Compromise Settlement Agreement of November 5-15, 1935, or for, or on account of, the Administrators' action in approving that Agreement and their acts and transactions in performance of the terms thereof; which acts are hereby specifically approved and confirmed.

amendment asserts no claim nor defense cognizable by the Court in which the case is pending, *Stephans v. Reed*, 121 F.2d 696 (CCA 3, 1941); *Overfield v. Pennroad Corp.*, 39 F.Supp. 482 (D.C. Pa., 1941); *American Securit Co. v. Shatterproof Glass Corp.*, 166 F. Supp. 813 (D.C. Del 1958), aff'd, 268 F.2d 769, Cert. Den. 361, U.S. 902, 80 S.Ct. 210, 4 L.Ed. 2d 157. See also *Laughlin v. Garnett*, 138 F.2d 931, 78 U.S. App. D.C. 194 (1944), Cert. Den. 322 U.S. 738, 64 S.Ct. 1055, 88 L.Ed. 1572

JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

SEVENTH: The Administrators, The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased, shall recover from Patricia R. Smith, beneficiary under the Will of John A. O'Brien, deceased, and she shall pay to them, for the benefit of the following persons, the sums set opposite their respective names:

The Louisville Trust Company and Citizens Fidelity Bank & Trust Company, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, deceased.....	$23,756.98
Oldham, Clarke and Irvin Marcus, for the benefit of their respective law firms (Allen, McElwaine, Dinning & Clarke and Davis, Boehl, Viser & Marcus).....	15,000.00
Bullitt, Dawson & Tarrant and Davis, Boehl, Viser & Marcus.....	35,000.00
A. Scott Hamilton, Special Commissioner (This sum to be taxed as a part of the court costs incident to this proceeding).....	2,000.00

which sums will be credited by such amount of money as may remain in the hands of the Administrators after the discharge of the debts of the Estate, and the payment of any further taxable costs of this action.

This Court is completely satisfied that the defendant took part in and participated in the settlement of the final account within the meaning of the Kentucky law. *Logan's Adm'r v. Troutman's Ex'r.*, 10 Ky. 66 (1820); *Bell v. Henshaw*, 91 Ky. 430, 15 S.W. 3 (1891); *Turley's Adm'r v. Barnes*, 103 Ky. 127 (1898); *Welch v. Lewis, et al.*, 104 Ky. 531, 47 S.W. 454 (1898). She cannot now be permitted to challenge this settlement in this action. Her remedy was by appeal to the Jefferson County Circuit Court, and there-

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JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952, CONTINUED FROM THE PRECEDING PAGE.

EIGHTH: The Accounts of the Administrators be, and the same hereby are, confirmed and approved in all respects. The Estate of John A. O'Brien, deceased, be, and the same hereby is, finally settled. The Administrators be, and hereby they are, discharged and released from any, and all, further liability under their bonds as such."

[2] **AMENDED JUDGMENT OF MAY 1, 1952, OF THE JEFFERSON COUNTY COURT, LOUISVILLE, KENTUCKY.**

The balance $28,337.57 of the assets of this Estate in the hands of the Joint Administrators is not sufficient to pay the amounts heretofore allowed for the compensation to the Administrators, to their counsel, and the taxable costs herein, as set out in Paragraphs FIFTH and SEVENTH of the Judgment entered herein on March 5, 1952.

The Administrators have paid to Patricia O'Brien Smith, the PRINCIPAL legatee, devisee, distributee, and beneficiary under the will of John A. O'Brien, deceased, an undue proportion of her demand, and more than all of her share of any legacy under the Will of John A. O'Brien, deceased, or any interest she may have therein, under a mistake as to the solvency of the John A. O'Brien Estate, or otherwise.

after, if she desired, to the Court of Appeals of Kentucky. It is not for this Court at this time to review the findings of the County court of Jefferson County upon which the County Court based its final judgment approving the final settlement filed by the plaintiff administrators.

For the reasons herein stated the Court concludes that the plaintiffs' motion for summary judgment as to the defendant's original counterclaim should be granted. The defendant's motion to amend the counterclaim should be

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AMENDED JUDGMENT OF JEFFERSON COUNTY COURT OF MAY 1, 1952. CONTINUED FROM PRECEDING PAGE.

Now, therefore, it is hereby ordered and adjudged that Paragraph EIGHT of the Judgment entered herein on March 5, 1952, be, and it is, now and hereby modified and amended to read as follows:

EIGHT: The accounts of the Joint Administrators be, and hereby they are, approved and confirmed, in all respects.

The Estate of John A. O'Brien, deceased. be, and the same hereby is, finally settled.

The Joint Administrators be, and hereby they are, authorized and empowered to sue, and to take any and all steps necessary or proper to recover from Patricia O'Brien Smith (1) All the amounts adjudged against her in Paragraph SEVENTH of this Judgment; and (2) Any and all additional amounts constituting any overpayment by the Joint Administrators to the said Patricia O'Brien Smith, which aggregate amounts so recovered shall be sufficient for the Joint Administrators to pay in full all obligations of the Joint Administrators and of the Estate, as authorized in Paragraphs FIFTH and SEVENTH of this Judgment.

/s/ Boman L. Shamburger,
Judge

May 1, 1952

denied. An order may be presented in accordance with the Court's conclusions.

/s/ W. Wallace Kent

United States District Judge
Western District of Michigan
Sitting by designation

ENTERED
MAR. 4, 1961
MARTIN R. GLENN, Clerk
By /s/ A. Rigsby
Deputy Clerk

A Copy: Attest
Martin R. Glenn, Clerk
By /s/ Loraine Miller
Deputy Clerk.

APPENDIX F

DEFENDANT PATRICIA R. SMITH'S PETITION FOR REHEARING

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
At Louisville

Civil Action No. 3218

THE LOUISVILLE TRUST COMPANY and CITIZENS FIDELITY BANK AND TRUST COMPANY, Joint Administrators with the Will Annexed of the Estate of John A. O'Brien, Deceased - - - - - - Plaintiffs

vs.

PATRICIA R. SMITH - - - - - - - - - Defendant

PETITION FOR REHEARING ON THIS COURT'S OPINION (JUDGE W. WALLACE KENT) RENDERED AND FILED IN THE ABOVE STYLED CASE ON MARCH 4, 1961.—Filed on April 3, 1961. Stamped by Martin R. Glenn, Clerk.

This Court (Judge W. Wallace Kent) is in error in its statements of facts in this case on page one thereof, and there is no proof in the records of this case to support his findings or conclusions. The last will of John A. O'Brien, deceased, gave to his wife, Patricia R. O'Brien (now Smith) all of the personal property of his estate, and he did not own any real estate at the time of his death. See defendant's Exhibit "B", filed herein on February 23, 1957 with her Tendered Amended Answer and Amended Counterclaim.

The Court of Appeals of Kentucky in its opinion ruled that Mrs. Patricia O'Brien-Smith was the sole beneficiary of the will and of the estate of her husband, John A.

O'Brien. (See page one of the opinion in *O'Brien vs. O'Brien*, 294 Ky. 793; 172 S.W. 2d 959.

Further, that all of the insurance amounting to two hundred one thousand ($201,000.00) dollars on the life of John A. O'Brien, deceased, was made payable to Patricia R. O'Brien (now Smith) and that her name was the only one endorsed on the insurance policies and that *no endorsement of an insurance trust agreement had ever been put on any of the insurance policies.* Therefore, there was no legal reason for Mrs. O'Brien-Smith to take less than the net sound market value for her interest in the partnership firm of Edward J. O'Brien & Company. Bogus claims are not legitimate compromising points. See defendant's Exhibits Nos. 5, 6, 7, 8, 9, 10, 11 and 12, filed in this Court before Judge Kent on August 27, 1959, attached to defendant's Supplemental Affidavit, as set out below: (see Printed Transcript of Record pages 503a-631½a).

Defendant's Exhibit No. 5—A photostatic copy of Equitable Life Assurance Society of the United States, Policy No. 8,870,524, $50,000.00, Payable to Mrs. Ivy Patricia O'Brien (now Smith);

Defendant's Exhibit No. 6—A photostatic copy of Massachusetts Mutual Life Insurance Company, Policy No. 896601, $50,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 7—A photostatic copy of Massachusetts Mutual Life Insurance Company, Policy No. 841255, $35,000.00, payable to Mrs. Patricia R. O'Brien;

Defendant's Exhibit No. 8—A photostatic copy of Massachusetts Mutual Life Insurance Company, Policy No. 839641, $15,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 9—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy 146050A, $10,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 10—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy 146050B, $20,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 11—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy No. 175879, $1,000.00, payable to Patricia R. O'Brien;

Defendant's Exhibit No. 12—A photostatic copy of Minnesota Mutual Life Insurance Company, Policy No. 145589, $20,000.00, payable to Patricia R. O'Brien.

This Court is in error because there was never any dispute of any kind or description between Patricia O'Brien-Smith and the members of the family of John A. O'Brien, deceased, and there is nothing in the record of this case to support any such findings. Patricia O'Brien-Smith never spoke to any members of the family of John A. O'Brien, deceased, after the death of her husband. Mrs. O'Brien-Smith acted on the advice of J. G. McPherson, Vice-President of The Citizens Fidelity Bank & Trust Company, and her attorney, William Marshall Bullitt, of the firm of Bullitt, Dawson & Tarrant, *whom she paid twenty-three thousand three hundred dollars and thirty-three cents* ($23,333.33) *out of her own pocket to represent her in the settlement of the estate of* John A. O'Brien, deceased, at 12 o'clock at night on February 11, 1936, two years after the death of John A. O'Brien. After the Bullitt firm was paid by Mrs. O'Brien-Smith, they started representing, and now still represent the joint administrators against Mrs. O'Brien-Smith, and they have been granted by the Order and Judgment of May 1, 1952, of the Jefferson County Court a law fee of over thirty-five thousand ($35,000.00) dollars for prosecuting law suits, appeals and petitions for rehearings against the estate of John A. O'Brien, deceased, for over twenty-five years of which four opinions of the Court of Appeals of Kentucky in the said law suits were decided in favor of Mrs. O'Brien-Smith, the Court of Ap-

peals, in effect, holding that these law suits should not have been brought in the first place by the joint administrators of the estate of John A. O'Brien, deceased.

The settlement agreement referred to on page one of the opinion entered into was between the administrators, The Citizens Fidelity Bank & Trust Company, The Louisville Trust Company and the O'Brien family, the defendant, Mrs. O'Brien-Smith, did not sign the settlement agreement to sell her interest in the Edward J. O'Brien Tobacco Company until after the joint administrators signed it and told her if she did not sign it she would not get anything from her husband's estate.

The joint administrators on page 16 of their large, printed, green booklet entitled "Their Account and Final Settlement of the Execution of Their Trust" (which has been put into the records of this case without a motion or notice to the defendant or her counsel after this case was removed to Federal Court) have altered a record in this case, in fact a letter signed by Mrs. O'Brien-Smith and dated November 14, 1935, after a photostatic copy of said letter was made and pasted in their green booklet *by putting on the letter after the word "day" a large "9" in red ink, trying to alter* the date of November 14, 1935, at the top of the letter, signed by Mrs. O'Brien-Smith.

At the bottom of the first page of the opinion, this Court is in error. None of the law suits which have been prosecuted in the Estate of John A. O'Brien, deceased, and cited on pages two (2), three (3), and four (4) of this Court's opinion ever raised the issue of fraud against the joint administrators, The Citizens Fidelity Bank and Trust Company and The Louisville Trust Company.

Mrs. Patricia O'Brien-Smith only received two hundred eighty-thousand ($280,000.00) dollars for her interest in the partnership of Edward J. O'Brien Tobacco Company, from the three hundred eighty thousand ($380,000.00) dollars

which was the sale price received by the joint administrators. The joint administrators and their attorneys kept one hundred thousand ($100,000.00) dollars of the sale price of the partnership interest they claimed for the purpose of paying administrators' fees and lawyers' fees. The Federal Inheritance Taxes on the estate had already been paid before the joint administrators kept the one hundred thousand ($100,000.00) dollars. The fact that Mrs. O'Brien-Smith received thousands of dollars by the sale of the partnership interest, that in no way changes any of her legal rights to be paid the full amount or the net sound market value of her thirty-three and one-third (33 ⅓%) per cent interest in the partnership firm of Edward J. O'Brien & Company.

The joint administrators contend that all of the above amount which they kept has been spent by them in the prosecution of litigation against the said estate and Mrs. Smith with the exception of some thirty thousand dollars ($30,000.00). During this time no interest on the said amount has been paid to Mrs. Smith, or this estate. All of the above facts were before this Court and fully briefed before this opinion was rendered on March 4, 1961.

This Court (Judge W. Wallace Kent) is in error, and does not state correctly what motions were before him when he rendered the opinion in the above styled case which was filed and entered in the office of the Clerk of the United States District Court at Louisville on March 4, 1961.

On page two (2), sixth line from the top of the page, of the opinion states:

> "There are before us two motions: plaintiffs' motion for summary judgment on defendant's original counterclaim, and "defendant's motion to file an amended counterclaim."

THE MOTIONS WHICH WERE BEFORE THIS COURT WHEN THE OPINION WAS RENDERED

AND FILED ON MARCH 4, 1961, ARE AS FOLLOWS:

1. "Motion that trust company administrators be required to forthwith pay into court thirty-thousand ($30,000.00) dollars in U. S. Treasury 2% notes and seven hundred sixty-two dollars fifty-nine cents ($762.59) cash belonging to the estate of John A. O'Brien, deceased." Filed November 3, 1956.

2. "Motion for an order barring William Marshall Bullitt and all other members of the law firm of Bullitt, Dawson & Tarrant from representing the Louisville Trust Company and the Citizens Fidelity Bank & Trust Company against Patricia O'Brien-Smith in the within action or any other actions against her by said trust companies, because that law firm represented Mrs. O'Brien-Smith in the estate of John A. O'Brien, deceased, and were paid thirty-three thousand three hundred thirty-three dollars and thirty-three cents ($33,333.33) by her in 1936, two years after the death of John A. O'Brien." Filed November 3, 1956.

3. "Joint administrators motion for a summary judgment dismissing Mrs. Smith's counterclaim." Filed February 19, 1957.

4. "Defendant Patricia R. Smith's motion for leave to file an amended answer and an amended counterclaim surcharging the joint administrator's settlement and on bond of the estate of John A. O'Brien, deceased." with Exhibits B, C, D, E, F and G attached thereto. Filed on February 23, 1957.

5. "Joint administrators' motion for leave to file their administrators' amended reply to Mrs. O'Brien-Smith's counterclaim." Filed September 8, 1959.

6. "Joint administrators' amended reply to Mrs. O'Brien-Smith's counterclaim with six exhibits annexed thereto." The said reply was printed and also the six (6) exhibits were printed therein. The amended reply and exhibits consisted of 152 printed pages. Tendered September 8, 1959.

Defendant Patricia R. Smith's Petition For Rehearing

7. "Joint Administrators' amended motion for a sumary judgment by the joint administrators to dismiss Mrs. Smith's counterclaim." Tendered September 8, 1959.

This Court is in error in paragraph three (3) on page 2 of its opinion, *the "plaintiff's (joint administrators) Original Motion for a Summary Judgment,"* filed in the within case on February 19, 1957, to dismiss Mrs. Smith's original counterclaim, which was filed in the within case on November 12, 1956, with her "original answer," *was not based upon the theory that the defendant, Mrs. Smith, is barred by the rule of res judicata from raising the issues presented by her original counterclaim.*

Surely this Court (Judge W. Wallace Kent) remembers that *he is the one who suggested to the joint administrators and their attorneys* at a pre-trial conference in Louisville on August 28, 1959, *that they should raise the issue of the rule of res judicata,* and gave the attorneys for the joint administrators the law citations of *Davis v. McKinnon and Mooney,* and told them that he would mail them the advanced sheets before the opinion was printed, in order to help them to try to prove it.

At the above meeting, counsel for Mrs. Smith stated to this Court that no relief was sought against the joint administrators, and no relief was prayed for in the Reformed and Amended Petition, filed in the case of *O'Brien vs. O'Brien,* 294 Ky. 793; 172 S.W. 2d 595. Counsel for the defendant further stated to this court that the joint administrators were only named as nominal parties defendant in the "Rescission Suit," so that Mrs. O'Brien-Smith could maintain the "Rescission Suit" in her name after the joint administrators refused to file the suit for rescission of the sale of the partnership interest belonging to the estate of John A. O'Brien, deceased, in the Edward J. O'Brien Tobacco Company.

Judge E. B. Freed, Judge of the United States District Court at Cleveland, Ohio, upheld Mrs. Smith in the above contentions, and ruled that the case of *O'Brien vs. O'Brien, supra,* did not make the issue of fraud against the joint administrators res judicata, and we again quote the ruling of Judge Freed and copy herein his order on his opinion in the case of—

> "In the United States District Court for the Western District of Kentucky at Louisville, No. 870, Patricia R. Smith v. The Louisville Trust Company and The Citizens Fidelity Bank and Trust Company, filed on March 16, 1945, and dismissed without prejudice by Mrs. Smith on March 10, 1949."

"IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

"PATRICIA R. SMITH	)	CIVIL ACTION NO. 870
v.	)	*ORDER*
THE LOUISVILLE TRUST COMPANY, a corporation, et al)	)	

This matter came on for hearing on the motion of the defendants, The Louisville Trust Company and Citizens Fidelity Bank and Trust Company, for a summary judgment under favor of Rule 56 of the Rules of Civil Procedure, the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment be and is hereby overruled.

s/ E. B. FREED
UNITED STATES DISTRICT JUDGE"

November 7, 1947

Defendant Patricia R. Smith's Petition For Rehearing

"IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PATRICIA R. SMITH	)	CIVIL ACTION NO. 870
vs.	)	MEMORANDUM RE
THE LOUISVILLE TRUST	)	MOTION FOR
COMPANY	)	SUMMARY
a corporation, et al.	)	JUDGMENT

FREED, J:

Defendants' motion for summary judgment is predicated on the contention that two prior actions in the State Courts of Kentucky prohibit a right of recovery by the Plaintiff in this Court. The prior actions were referred to in the Defendants' answer, in the respective briefs of the parties and arguments of counsel as the "Rescission suit" and "Settlement suit".

The record in the Settlement suit clearly discloses that the Court refused to adjudicate the precise claim of Plaintiff urged in this action. It refused to receive any evidence in support of the charge of negligence by the Defendant corporations in handling the estate of John O'Brien. (See pages 12 to 20 of the second amended answer or pages 250 to 257 of the printed transcript of record). Such ruling by that Court in the Settlement suit cannot conceivably result in a bar to the instant controversy.

Whether the judgment in the O'Brien vs. O'Brien, (294 Ky. 793), the Rescission suit, is res judicata as to this action or constitutes an estoppel by judgment must be determined by the Law of Kentucky. Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. (309 U.S. 4); In re Potts, 6 Cir., (142 F (2d) 883); Waybright v. Columbian Mutual Life Insurance Co., 6 Cir., (122 F (2d) 245).

Defendant Patricia R. Smith's Petition For Rehearing

To render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties to the action and identity of quality in the persons or parties for whom or against whom the claim is made. Swift Coal and Timer Co. v. Cornett, (249 Ky. 760); Ralph Wolff & Sons v. New Zealand Insurance Co., (248 Ky. 304)."

"In the case of Prewitt v. Wilborn, (184 Ky. 639), the Court of Appeals clearly pointed out the distinction between the doctrine of res judicata and estoppel by judgment as follows:

> "A distinction must be drawn, however, between the effect of a judgment in a second suit between the same parties, upon the same cause of action, and a second suit between the same parties upon a different cause of action. In the first instance, the judgment is a complete bar to the second action, not only as to everything which was used in the first action to sustain or defeat the demand, but, everything, which the parties could have used properly for that purpose; but in the second instance, where the second suit is between the same parties upon a different cause of action from that involved in the first action, the judgment in the first action is an estoppel to a relitigation of questions which were actually litigated and determined in the first action, and of such questions as were necessarily determined by the judgment in the first action in arriving at the decision and is not conclusive as to matters not decided, and the decision of which was not essential to the decision in the first suit, although issues may have been made in reference to them."

It is readily discernible from the examination of the Rescission Suit and this action, that there is lacking the identity of the quality of the parties necessary to bring the Rescission suit within the ambit of the doctrine of res judicata or estoppel by judgment. The principles of law laid down by the Kentucky courts applied to the causes of

action in issue leads the Court to the conclusion that the motion for summary judgment must be overruled.

s/ E. B. Freed

United States District Judge"

November 6, 1947

The law that was in effect and controlling on the issue of res judicata on November 7, 1947, and in effect when the joint administrators committed fraud in the sale of the interest of the estate of John A. O'Brien, deceased, in Edward J. O'Brien Tobacco Company for less than one-third (⅓) of the net sound market value, is the law that is controlling in this case, and the citation given to the joint administrators by this Court (Judge Kent) of *Davis v. McKinnon and Mooney,* 266 Fed. 2d 870, 873 (1959), does not apply to the instant case, and none of the other cases cited on pages 7 and 8 of the opinion have any application to the within case.

As will be noted from the opinion of Judge Freed of November 6, 1947, on the joint administrators motion for summary judgment, Judge E. B. Freed of Cleveland, Ohio, ruled that "whether the judgment in the case of *O'Brien vs. O'Brien,* (294 Ky. 793), the Rescission Suit is res judicata as to this action or constitutes an estoppel by judgment must be determined by the law of Kentucky". See the cases of *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.* (309 U.S. 4); *In re Potts,* 6 Cir., (142 F. (2d) 883); *Waybright v. Columbian Mutual Life Insurance Co.,* 6 Cir., (122 F. (2d) 245). Therefore, the case of *Davis vs. McKinnon & Mooney,* 266 Fed. (2d) 870, 873 (1959) which was cited in this Court's opinion *and was tried in the Common Pleas Court of Lake County, Ohio, has no application to a case in Kentucky,* in an action against joint administrators because they violated their trust and their bonds in the settlement of the estate of John A. O'Brien, deceased.

Further, Judge Freed held that "to render the doctrine of res judicata applicable under the adjudicated cases in Kentucky, it is imperative that there be coexistent identity of subject matter; identity of causes of action; identity of parties for which or against whom the claim is made, *Swift Coal and Timer Co. v. Cornett,* (249 Ky. 760); *Folph Wolff & Sons v. New Zealand Insurance Co.,* (248 Ky. 304)".

We have examined the other cases cited on pages 7 and 8 of this Court's opinion and not a single one of the cases apply to the instant case. This Court should apply the laws of Kentucky on the issue of res judicata as stated in the opinion of Judge E. B. Freed.

The adoption of the rule in the Davis vs. McKinnon & Mooney case by this court is not the rule in Kentucky and never has been. If it is the rule now in Ohio, it did not become so until May 28, 1959, and that is years later than when this cause of action arose in the state of Kentucky.

The adoption of this rule of law now (1961) in Kentucky which grew out of a decision in Ohio in 1959 (*Davis vs. McKinnon and Mooney*) certainly should not be used to govern the findings in a law suit where the cause of action arose ten years or more before the decision in the *Davis vs. McKinnon & Mooney* case and after the litigation was instituted regardless of the unfairness of the application in the instant case it is not the rule in Kentucky and the Kentucky law should control in this decision.

Governor Wilbur M. Brucker of Detroit, Michigan, former governor of Michigan, and former Secretary of the Army, represented the defendant, Mrs. O'Brien-Smith, from 1940 to 1944 in the "Rescission Suit" against the O'Brien brothers, and he stated to the joint administrators more than once that no relief was sought against them in the "Reformed and Amended Petition in the Rescission Suit,"

nor prayed for in the prayer of the Petition in the Rescission Suit, and that they were only named as nominal parties, defendant, so that Mrs. O'Brien-Smith could maintain "the Rescission Suit," in her own name.

It was not necessary for the joint administrators to employ attorneys in the "Rescission Suit" and to file strong briefs against the estate of John A. O'Brien and Mrs. O'Brien-Smith, and when the first opinion was rendered in the Rescission Suit by the Court of Appeals of Kentucky, it was a divided court. One Judge was home ill, but three of the judges were of the opinion *that Mrs. O'Brien-Smith was entitled to eighty-five thousand ($85,000.00) dollars or more because that was the net profit belonging to the estate of John A. O'Brien deceased, for the year of 1935 from Edward J. O'Brien & Company, which was not disclosed to the defendant Mrs. O'Brien-Smith before the partnership interest was sold.* The joint administrators and their attorneys should have joined with Governor Brucker in filing briefs on the petition for rehearing in the Rescission Suit and in the Oral Argument of Governor Brucker before the Court of Appeals of Kentucky on the Petition for rehearing; instead, the joint administrators and their attorneys joined with the O'Brien brothers and bitterly fought against the estate and bitterly opposed Mrs. O'Brien-Smith throughout the "Rescission Suit." Now why should this estate pay either the joint administrators or their attorneys in the "Rescission Suit." The above was all stated to this Court in the "Defendant's, Mrs. Smith, Response to Joint Administrators Printed Reply to Mrs. O'Brien-Smith's original counterclaim."

This Court should consider this question; "Should lawyers be paid for law suits filed and prosecuted in an estate, when they lost each and every suit in the Court of Appeals of Kentucky and even after the Court of Appeals of Ken-

tucky ruled against them, the joint administrators *defied the Rulings of the Court of Appeals of Kentucky; they defied the rulings of the Judge of the Jefferson County Court* and kept on filing suits and appeals in the Jefferson Circuit Court, and the Court of Appeals of Kentucky, lawyers who hold themselves out as being well versed on Kentucky law and administrators who claim they have the largest banks and trust companies in Kentucky. Thus, the estate of John A. O'Brien and Mrs. Smith should be reimbursed for the expense of those law suits and for the long years of tiresome and expensive litigation, which Mrs. Smith has had to pay for out of her own pocket all because the trust companies and their attorneys knew they had committed fraud in the sale of the interest of Mrs. O'Brien-Smith in the Edward J. O'Brien Tobacco Company, and they were hoping to wear down the resistance of Mrs. O'Brien-Smith and her lawyers and to force her to give up her legal rights and claims in the estate of John A. O'Brien, deceased.

THE THEORY THAT THIS COURT HAS NO PROBATE JURISDICTION TO CONSIDER THE "DEFENDANT'S AMENDED ANSWER AND AMENDED COUNTERCLAIM", IS GROUNDLESS.

The theory that this Court has no probate jurisdiction to consider the "defendant's amended answer and amended counterclaim" is groundless. In reply to the Court's statement and ruling on page three (3) of the Opinion that the joint administrators objection, to "Mrs. Smith's motion for leave to file an amended answer and amended counterclaim," in the within action should be sustained, is without any legal basis.

If this Court has no probate jurisdiction to consider the "Defendant's amended answer and amended counterclaim" (tendered herein on February 23, 1957), then this Court has no jurisdiction to consider the "Order and Judgment,"

of March 5, 1952 and amended on May 1, 1952, of the Judge of the Jefferson County Court in favor of the joint administrators and their attorneys on a matter for the joint administrators' which is definitely a probate matter, "Their purported Final Settlement of Accounts for the Estate of John A. O'Brien, deceased." How then can this Court determine the accuracy of the different lawyers' fees for their different law suits filed in probate matters in the final settlement of the said estate if the court does not go into all phases of the probate matters?

All of the fees in the sum of seventy-five thousand seven hundred fifty-six dollars and ninety-eight cents ($75,756.98) that the joint administrators are seeking to obtain in this law suit for the Joint Administrators, and all of the fees for their seven law firms, namely:

(1) Peter, Heyburn, Marshall & Wyatt; who filed the joint administrators' first settlement suit at then withdrew from the case;

(2) Gordon, Laurent, & Ogden; who first represented The Louisville Trust Company was paid a fee of two thousand ($2,000.00) dollars from the O'Brien estate over protest of Mrs. Smith and they withdrew;

(3) Davis, Boehl, Viser & Marcus;

(4) Allen, McElwain, Dinning & Clarke;

(5) Bruce & Bullitt;

(6) Bullitt, Middleton, Seelback & Milner, and

(7) Bullitt, Dawson & Tarrant.

The last five law firms have been awarded five different law fees for prosecuting trumped-up law suits in the estate of John A. O'Brien, deceased, since nineteen hundred and thirty-seven (1937), a period of twenty-four years, all of which grew out of purported settlements of the said estate, and were all in a probate matter. All of the law firms who were employed to delay for the joint administrators their filing of a final settlement of the estate of John A. O'Brien,

deceased, in the Jefferson County Court for twenty-seven (27) years, as we have clearly shown.

Now this Court has stated on page 3 of its opinion that "Reference to previous litigations will be made only when it is pertinent to the determination of the motions before the Court in this case,"—no reference was ever made.

Now this Court's opinion has set up on pages 2, 3 and 4 of its opinion all of the law suits that have been filed and prosecuted in the estate of John A. O'Brien, deceased, and has devoted three one-half pages, single spaced, to enumerating them as though that would be legal grounds for awarding the lawyers' fees to them. It must be remembered it was the joint administrators who filed and caused to be filed all of those law suits except two, and we here set up the law suits in detail.

Why should the estate of John A. O'Brien and Mrs. O'Brien-Smith pay for law suits filed by administrators over a period of twenty-eight years to keep from filing a final settlement of the accounts of the said estate and to cover up their acts of fraud in the sale of the partnership interest, and their other acts of fraud. The records show that the joint administrators were in contempt of Court in defying the Rulings of the Court of Appeals and of the Jefferson County Court both in refusing to file a final settlement of their accounts of the said estate.

THE LAW SUITS FILED AND CAUSED TO BE FILED BY THE JOINT ADMINISTRATORS AND PROSECUTED IN THE ESTATE OF JOHN A. O'BRIEN, DECEASED

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1. The joint administrators first settlement suit of the estate of John A. O'Brien, deceased, filed in the Jefferson Circuit Court at Louisville, No. 250301, styled *The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company vs. Patricia R. O'Brien*, was started on February 18, 1937, and was not finally determined until

Defendant Patricia R. Smith's Petition For Rehearing

May 16, 1950, after the joint administrators had filed a second appeal to the Court of Appeals of Kentucky and two petitions for rehearing and lost the suit, which was won by Mrs. O'Brien-Smith on both the first and second appeals to the Court of Appeals of Kentucky.

2. Reported Decision—*Smith vs. Burnett, Judge,* 300 Ky. 249, S.W. 2d 480. Mrs. O'Brien-Smith's original action in the Court of Appeals of Kentucky for Writ of Prohibition against Judge Burnett to stop him from proceeding with the joint administrators' first settlement suit. Writ denied June 15, 1945. When Mrs. O'Brien-Smith won the first appeal, the petition for rehearing and the joint administrators' second appeal on the first settlement suit, it proved she was right in her contention in the Writ of Prohibition Suit, which she filed in order to keep the joint administrators from proceeding with the first settlement suit in Jefferson Circuit Court against the estate of John A. O'Brien, deceased, and to keep the estate from being burdened with the expense of a law suit.

Mrs. O'Brien-Smith's first appeal of the joint administrators' first settlement suit, *Smith vs. The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company* 308 Ky. 189; 213 S.W. 2d 987, June 8, 1948; rehearing denied to the joint administrators on October 29, 1948. This suit was won by Mrs. Smith in the Court of Appeals of Kentucky.

The joint administrators second appeal of their first settlement suit filed on April 6, 1949, *The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company vs. Smith,* 313 Ky. 15; 230 S.W. 2d 64, May 16, 1950. This was won by Mrs. Smith, in the Court of Appeals of Kentucky.

3. The joint administrators second settlement suit of the estate of John A. O'Brien, deceased, filed in the Jefferson Circuit Court No. 313655, styled *The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company vs. Patricia R. Smith,* was filed on March 31, 1949, and was not dismissed in the Jefferson Circuit Court until after the Court of Appeals of Kentucky granted to Mrs. Smith a permanent injunction enjoining the joint admin-

istrators from ever filing a second settlement suit of the estate of John A. O'Brien, deceased, in the Jefferson Circuit Court, the reported decision on the permanent injunction granted to Mrs. Smith is *Smith vs. The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 237 S.W. 2d Ky. 836. Rehearing denied to the joint administrators. Mrs. O'Brien-Smith's suit to enjoin the joint administrators from prosecuting a second settlement suit against the estate of John A. O'Brien, deceased, was No. 313986, in the Jefferson Circuit Court, filed on April 21, 1949.

The joint administrators' purported final settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court, No. 24146 (filed June 21, 1950 - May 1, 1952). Judge Brady Stewart ruled that this could not be a final settlement of the estate of John A. O'Brien, deceased, *until the joint administrators' second settlement suit in the Jefferson Circuit Court was dismissed and until the joint administrators' appeal from an order of the "Rule Issued" against them in the Jefferson County Court to the Jefferson Circuit Court, which was not dismissed until July, 1954.*

4. On May 26, 1949 the joint administrators appeal to the Jefferson Circuit Court, No. 314,574 from the "Rule Issued" against them by the Judge of the Jefferson County Court ordering them to file a final settlement of the estate of John A. O'Brien by June 5, 1949, and the joint administrators had a supersedeas executed June 2, 1949, on Jefferson County Court Judge by serving on Hon. Horace A. Barker, judge of the Jefferson County Court, a copy of the supersedeas enjoining the judge of the Jefferson County Court from proceeding in the settlement of the estate of John A. O'Brien, deceased, in the Jefferson County Court, which the joint administrators appealed from the order of the Jefferson County Court, making the motion for "Rule," against them "absolute." The said appeal was not dismissed until July, 1954. That supersedeas was as binding on Judge Barker's successor as it was on Judge Barker, and his successor in office was Judge Boman L. Shamburger, and when he was proceeding to have hearings on the settlement of the accounts of the joint administra-

tors of the estate of John A. O'Brien, deceased, in July-December, 1951, and January and March, 1952, the appeal of the joint administrators was still in full force and effect, as well as the joint administrators supersedeas, and the joint administrators refused to dismiss the said appeal and Shamburger refused to order them to do so.

5. *Smith vs. Shamburger, Judge*, 314 Ky. 850; 238 S.W. 2d 844. Mrs. O'Brien-Smith's original action in the Court of Appeals of Kentucky to stay Judge Shamburger from proceeding in Jefferson County Court for the purported final settlement of the estate of John A. O'Brien, deceased, January 26, 1951; rehearing denied May 11, 1951. Mrs. O'Brien-Smith lost that suit, but was upheld in her contentions in the said suit by the "Ruling" of Judge Brady Stewart that there could not be a final settlement of the estate of John A. O'Brien, deceased, as long as the joint administrators second settlement suit was pending in the Court of Appeals of Kentucky and as long as the joint administrators' appeal to the Jefferson Circuit Court on the "Rule Issued" against them in the Jefferson County Court to settle the estate of John A. O'Brien, deceased, to file a final settlement of the estate of John A. O'Brien was pending in the Jefferson Circuit Court, and the said appeal of the joint administrators was not dismissed in the Jefferson Circuit Court until July, 1954.

THE ONLY SUITS FILED IN THE ESTATE OF JOHN A. O'BRIEN, DECEASED BY MRS. O'BRIEN-SMITH:

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1. Mrs. O'Brien-Smith's Rescission Suit, to rescind the November 5-15, 1935, sale of Mr. O'Brien's partnership interest in E. J. O'Brien & Company, by the joint administrators. In Jefferson Circuit Court No. 250,536, *Patricia R. O'Brien vs. Edwin J. O'Brien, et al.* (March 10, 1937-May 8, 1944). This suit was against the O'Briens only, as held by Judge E. B. Freed of Cleveland, Ohio.

Reported decisions: *O'Brien v. O'Brien*, 294 Ky. 793, 172 S.W. 2d 595; S.C. cert. den. 321 U.S. 767 (January 31, 1944); rehearing denied 322 U.S. 769 (May 8, 1944). This suit was against the O'Brien brothers only and it was not

necessary for the joint administrators to even answer it or take any part against the estate and Mrs. O'Brien-Smith.

2. Mrs. O'Brien-Smith's suit for a permanent injunction against the joint administrators to enjoin them from prosecuting a second settlement suit in the estate of John A. O'Brien, deceased, was filed in Jefferson Circuit Court, No. 313,986, and won by her in the Court of Appeals of Kentucky, styled *Smith v. Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 237 S.W. 2d Ky. 836. Petition for rehearing was denied to the joint administrators.

3. Mrs. O'Brien-Smith's suit to force the joint administrators to sign all of the carbon copies that they supplied to restore all of the records of the estate of John A. O'Brien, deceased, that were lost, misplaced or stolen when removed by the joint administrators from the Jefferson County Court to the Jefferson Circuit Court on their appeal from the "Rule Issued" against them by the Judge of the Jefferson County Court to file a final settlement of the O'Brien Estate by June 2, 1949. *Smith v. The Louisville Trust Company, and Citizens Fidelity Bank & Trust Company*, 262 S.W. Ky. 479, November 20, 1953. Mrs. Smith won the suit and a final order was entered in the Jefferson Circuit Court in July, 1954.

4. Mrs. O'Brien-Smith's $322,035.04 Damage Suit against the joint administrators alleging fraud in the sale of Mr. O'Brien's partnership interest by the joint administrators—in Federal Court (Louisville), No. 870, *Patricia R. Smith v. Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, dismissed without prejudice by Mrs. Smith, March 10, 1949. See order of Judge E. B. Freed of March 10, 1949.

5. Reported decisions: *Commonwealth v. Shilladay*, 311 Ky. 478, 224 S.W. 2d 685—Indictments returned on April 17, 1948 of accountants (representatives of Arthur Young Company, accounting firm, who audited E. J. O'Brien & Co.'s books for use in the $822,035.04 Federal Court Damage Suit against the joint administrators. That suit was against the accountants only, and it was not necessary for the joint administrators to attend all the hearings and to

assist the accountants in winning the suit, unless they were the cause of them stealing the auditing work sheets and refusing to render an audit to Mrs. Smith for which they had been paid.

6. Mrs. O'Brien-Smith on October 1, 1951, filed petition for removal in Federal Court (Louisville), No. 2224, to remove to Federal Court the joint administrators' Jefferson County Court proceedings for final settlement of Mr. O'Brien estate; which petition for removal was denied.

When this Court was listing the law suits and appeals and petitions for rehearings on pages 2, 3 and 4 of his opinion that had been filed in the estate of John A. O'Brien, why did this Court fail to set out or state the fact *that the joint Administrators on May 26, 1949, filed an appeal in the Jefferson Circuit Court from the "Rule Issued" against them in the Jefferson County Court to file a final settlement of the estate of John A. O'Brien, deceased, in County Court by June 5, 1949.* Further, that the joint administrators had a supersedeas executed on Judge Horace A. Barker on June 2, 1949, staying all proceedings to file a final settlement in the Estate of John A. O'Brien. Further, that the joint administrators' appeal to the Jefferson Circuit Court was not dismissed until July, 1954, making the "Order and Judgment" of March 5, 1952, and May 1, 1952, of the Jefferson County Court void ab initio.

If the joint administrators and their seven law firms are awarded seventy-five thousand seven hundred fifty-six dollars and ninety-eight cents ($75,756.98) with six (6) per cent interest since May 1, 1952, they will get more out of the estate of John A. O'Brien, deceased, than the sole beneficiary of the estate and the will of John A. O'Brien, deceased.

Never before in the history of Kentucky Jurisprudence have such large fees been paid or trust companies and attorneys been permitted to consume over half of the entire estate by breach of their trust as personal representatives

and multiplicity of illegal and unwarranted law suits over a period of twenty-seven (27) years and to this day the joint administrators have not filed a final settlement of the estate of John A. O'Brien, deceased, according to the laws of Kentucky.

This Court has criticized the pleadings and briefs filed by counsel for the defendant, Mrs. Smith, in the within case. We wish to call this Court's attention to the fact that the Judges of the Court of Appeals of Kentucky, who are outstanding lawyers, thought enough of the pleadings and briefs of the counsel for the defendant, Mrs. Smith, to decide four cases and a number of petitions for rehearings in Mrs. Smith's favor and against the Citizens Fidelity Bank & Trust Company and the Louisville Trust Company as we have enumerated herein on pages 14, 15 and 16 of this petition for rehearing.

THE STATUTES OF LIMITATIONS OF KENTUCKY UPHOLD MRS. SMITH'S CONTENTIONS THAT SHE CAN SUE THE JOINT ADMINISTRATORS FOR FRAUD ON THEIR BONDS AS ALLEGED IN HER ANSWER AND ORIGINAL COUNTERCLAIM IN THIS CASE ON NOVEMBER 12, 1956.

This Court is in error in holding that Mrs. Smith cannot sue the joint administrators as principals or as sureties on their bonds, on page six (6) and seven (7) of its opinion, and on page four (4) and five (5) of the said opinion sets out the Statutes of Limitations of Kentucky.

The Statutes of Limitations of Kentucky uphold Mrs. Smith's contentions that she can sue the joint administrators for fraud on their bonds, as she alleged in her original counterclaim included in her original answer filed in this case on November 12, 1956.

Further, Mrs. O'Brien-Smith did not discover that the joint administrators were the ones who were guilty of fraud, misrepresentation, and failure to disclose to her the true market value of her interest in the Edward J. O'Brien Tobacco Company, and that the O'Brien brothers were not alone guilty of fraud until after the final decision in the case of *O'Brien v. O'Brien* in May, 1944, and she filed her original counterclaim herein on November 12, 1956, because in that case, the Court held in effect that it was not the duty of the O'Brien brothers to disclose to Mrs. O'Brien-Smith the value of her partnership interest because she had "competent and trustworthy counselors", meaning that the joint administrators should have ascertained the true market, net sound, value of her partnership interest in Edward J. O'Brien Tobacco Company, and both of the vice-presidents of the two trust companies, the joint administrators herein testified that they made no investigations whatsoever and took the word of Edwin J. O'Brien, Jr. as to what Mrs. Smith's partnership interest was worth.

This court contends that the defendant Mrs. O'Brien-Smith's original counterclaim relating to the sale of the decedent's partnership interest is barred by the Statutes of Limitations. This Court asserts that if Mrs. Smith has any cause of action upon her counterclaim it must be based upon the joint administrators' bonds. This Court states in his opinion that an action upon an administrator's bond is governed by KRS 413.090, and that the counterclaim of Mrs. Smith is barred by that statute, because Mrs. Smith did not commence an action thereon within 15 years after her cause of action "accrued".

To properly understand the legal effect of an administrator's bond, it is necessary to examine the statutory provisions pertaining not only to the bonds, but to the duties of the administrator for the performance of which the bond

is required. The requirements of a fiduciary bond, in Kentucky, are fixed by KRS 62.060, which provides that the bond of a fiduciary shall be a covenant from the principal and surety "that the principal will faithfully discharge his duties". Among the "duties" specified by statute to be performed by the personal representative are these "musts".

KRS 25.175 provides;

(1) He "must" one year after his appointment, and annually thereafter until otherwise provided by law "RENDER AN ACCOUNTING OF THE EXECUTION OF HIS TRUST TO THE COURT BY WHICH HE WAS APPOINTED."

(2) He "must" render an accounting at any other time upon the order of the court.

(3) "AT THE EXPIRATION OF HIS TRUST SUCH FIDUCIARY MUST FULLY ACCOUNT FOR AND PAY OVER THE TRUST ESTATE TO THE PERSON OR PERSONS ENTITLED THERETO," and

KRS 62.070 further provides:

"Recovery on the bond shall not be restricted to the duties or responsibilities belonging to the office, trust or employment at the date the bond is executed, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed."

The bond of the plaintiffs joint administrators covenanted that they would faithfully discharge all the above duties. It is of no consequence that the joint administrators are corporate fiduciaries, because a corporate fiduciary is expressly made subject to all the duties and responsibilities as individual fiduciaries except, upon the bond of a corporate fiduciary, the only security, unless otherwise required, shall be "the capital stock." *KRS 287.220.* Here, the bond of the plaintiffs Joint administrators contains no surety other than "the capital stock" of the two trust

companies, whatever that may mean. No "capital stock" was deposited as security, and no necessity arises for construing the meaning or effect of the statute providing that upon the bond of a corporate fiduciary the only surety required is the capital stock. It is sufficient here to consider that the bonds are executed by plaintiff trust companies as principals, and they are proceeded against here as principals. No complications or sureties are involved, and the liability asserted against the plaintiffs joint administrators on the counterclaim is their liability on the bond as principals. Under *KRS 62.070* recovery against the surety is limited to the penalty fixed in the bond, "but recovery against the principal shall not be limited by the penalty fixed in the bond."

The statute therefore places upon the personal representative the duty to make annual court settlements of his accounts, and to pay over the trust estate to the persons entitled thereto "at the expiration of his trust", and the official bond of the personal representative covenants that he will faithfully do so. Manifestly, if the personal representative fails to account for and turn over the property to the persons entitled thereto "at the expiration of his trust" he commits a breach of his bond. *Since he engages by his bond to turn over the estate "at the expiration of his trust" the cause of action on his bond accrues "at the expiration of his trust".* The question immediately posed is, "has there been an expiration of plaintiffs' joint administrators' trust?" If so, when did their duties as personal representative cease and determine? The answers to the questions are found in an exhaustive annotation in 44 ALR (2d) p. 808, wherein it is stated that, by the weight of authority, the statute of limitations begins to run against the action on a bond of a personal representative from the *date on which occurs a final judicial ascertainment of the liability of the*

personal representative. In 44 ALR (2d) pp. 808, 809, it is stated:

> "By the weight of authority the statute of limitations ordinarily begins to run against an action on the bond of a personal representative from the date on which occurs a final judicial ascertainment of the liability of the representative." . . .
>
> "Probate practice varies widely, of course, from jurisdiction to jurisdication. Usually the administration of a decedent's estate involves orders settling the intermediate or final accounts of the personal represenative, orders directing the manner of distribution of the assets, of the estate, and, at least sometimes, orders for the formal closing of the estate. Exhibiting a wide range of variations as to details, a number of cases support the proposition that limitations against an action on the bond of an executor or administrator—at least in the absence of specific circumstances requiring a different conclusion—commence to run at the time of the final judicial ascertainment of the liability of the personal representative to heirs, distributees, or creditors. This may mean the date of the only decree of distribution entered in the particular estate; it may mean the date of the last of a series of decrees or order for distribution; it may mean the date of the order approving the final account of the representative; it may mean the date of a decree surcharging the representative and then settling his accounts as corrected.
>
> "As noted before, variation as to details is great. But the following cases may be cited as supporting the broad conclusion that what is to be properly regarded as the final judicial ascertainment of the principal's liability marks the time limitations commence to run against an action on the official bond."

This question was posed in *Mercer vs. Glass' Exr.*, 15 KLR 710-713, 25 S.W. 114, and the court there held that the executorial duties ended, and the statute of limitations began to run from the time the settlement was filed, saying:

> "It seems to us therefore—First that the disposition of the estate in pursuance of the settlement made in

1867, of which the apportionment of the land is to be regarded as a part, WAS AN END OF THE EXECUTORIAL DUTIES OF THE SONS . . .

"Applying this principle here, we see no reason why the lapse of time does not bar the appellants cause of action. IT AROSE WHEN THE SETTLEMENT AND THE DIVISION UNDER IT WERE MADE, AND FROM THAT TIME THE STATUTE BEGAN TO RUN—the limitation of 15 years applying to the principay obligors, and 5 years to the sureties."

Likewise in *Hargis vs. Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, The court made the observation that the administrator's duties were not terminated until final settlement of his accounts saying:

"It seems to us therefore—First that the disposition of the estate in pursuance of the settlement made in 1867, of which the apportionment of the land is to be regarded as a part, WAS AN END OF THE EXECUTORIAL DUTIES OF THE SONS . . .

"Applying this principle here, we see no reason why the lapse of time does not bar the appellants cause of action. IT AROSE WHEN THE SETTLEMENT AND THE DIVISION UNDER IT WERE MADE, AND FROM THAT TIME THE STATUTE BEGAN TO RUN—The limitation of 15 years applying to the principal obligors, and 5 years to the sureties."

Likewise in *Hargis vs. Sewell's Admr.*, 87 Ky. 63, 7 S.W. 557, The court made the observation that the administrator's duties were not terminated until final settlement of his accounting saying:

"This rule could not have been applied to an administrator regardless of the present statute as he was never considered as such a trustee, AFTER THE SETTLEMENT OF HIS ACCOUNTS AND THE DISTRIBUTABLE SHARE OF THE HEIR ASCERTAINED."

The statute here involved, KRS 413.090(3), applies to actions upon the bonds of receivers, as well as personal representative. In the case of *U. S. Fideltity & Guaranty Co. vs. Shields*, 157 Ky. 371, 163 S. W. 203, the court held

that the statute of limitations against an action upon the bond of a receiver did not commence to run until the receiver had made a settlement of his accounts, or had made a report to the court. The court there said:

> "The plea of the statute of limitations is unavailing. The plaintiff had no cause of action against the receiver, while he held the fund subject to the order of the court. He had never settled his accounts or made a report to the court, and until the court determined to whom the money was to be paid, no action could be brought. The seven year statute bars an action against the surety after seven years from the time the cause of action accrued. But the statute does not begin to run until the cause of action accrues. Here the cause of action did not accrue until shortly before this action was brought. The cause of action against the surety accrues at the same time as it does against the principal."

Likewise in the case of *Tucker vs. Aetna Casualty & Surety Co.*, 270 Ky. 723, 110 S. W. (2d) 649, the court held that the right of an heir to sue for his distributable share of the estate of a decedent accrues upon the settlement of the estate. Referring to the case of *Hargis vs. Sewell's Admr., supra,* the court said:

> ". . . It also was held that when the distributable portion of the estate had been ascertained by the settlement, any heir had the right to sue for his distributable share, and the statute of limitation would run from the accrual of the cause of action to the same effect, See *Schwerman vs. Commonwealth*, 99 Ky. 296, 38 S.W. 146, 18 Ky. Law Rep. 585; *Grant County Building & Loan & Savings Association v. Lemmon*, 78 S. W. 874, 25 Ky. Law Rep. 1725; *Commonwealth v. Sammons*, 180 Ky. 403, 202 S.W. 885; *United States Fidelity & Guaranty Company v. Shields*, 157 Ky. 371, 163 S.W. 203."

The reasons for adopting the date of accounting and settlement for the commencement of the statute of limitations are obvious, and sound. No one can know the amount of his or her distributable share in decedent's estate until

the personal representative has made an accounting and a final settlement of an estate. And the finality of such accounting and final settlement, may have to await the final judgment of the court in the suit to surcharge the settlement for negligence or mismanagement. The joint administrators do not claim, and cannot claim that they made any final court settlement of their accounts in the estate of John A. O'Brien, deceased, until March 5, 1952. And, although their settlement is in the amended answer and amended counterclaim tendered hereby by Mrs. Smith, on the grounds of negligence and misconduct in the handling of the estate and a breach of trust, *the 15 year period from the date of the final settlement will not expire until 1967, and is not barred.* The sale of decedent's partnership interest by the joint administrators comprises an item that must be taken into consideration on a final settlement and accounting of the plaintiffs' joint administrators. *As long as the joint administrators assume and continue to act as such administrators, and have cash in their hands belonging to the estate, so long the counterclaim may be asserted, and it is not barred.*

Another aspect of the law in relation to the plea of limitations should be considered by the court on the joint administrators motion for summary judgment. The counterclaim for loss on the sale of decedent's partnership interest cannot be barred by limitations as a defense against the claims asserted by the joint administrators. The counterclaim relating to the sale of the partnership interest arises out of the same occurrence or transaction sued on by plaintiffs Joint Administrators, namely the administration by the joint administrators of the estate of the decedent. In such cases, the counterclaim is also a defense, and as long as this court will hear the joint administrators case, time will not bar the answer of the defendant, Mrs. Smith. A case in point is *Altman & Taylor vs. Meade,* 121 Ky. 241,

89 S.W. 137. There, the appellant sold a saw mill for $1900.00 and took a note and mortgage for the deferred payment of the purchase price in the sum of $1595.00 on the saw mill and certain real estate. Appellant procured a pre-confessed judgment, and a sale of the saw mill thereunder by the master commissioner for $700.00. More than five years thereafter, appellant sued for the balance owing on the note and to enforce the lien on the real estate. A "counterclaim" was filed by appellee alleging that the appellants had converted the saw mill under the void judgment. To this counterclaim the appellants pleaded the five year statute of limitations as a bar, and also estoppel alleging that appellee stood by and watched the saw mill sell, without objection, and even helped the purchaser to move it away. Holding that the statute of Limitations was inapplicable, and that the "counterclaim" constituted a good defense, this court said:

> "while appellees' claim against appellant might be properly a counterclaim in this suit upon the notes (section 96, Civ. Code Prac.), as it may be said to be connected with and grows out of the transaction or cause of action sued upon, it is also more than a counterclaim."

And in denying the plea of limitations, the court said:

> ".... For, admitting that the statute applies strictly to matters of set-off and counterclaim (Williams v. Gilchrist, 3 Bibb, 49; Gilchrist v. Williams, 3 A.K. Marsh, 235), still, as is well known, it does not affect the merits of the controversy. It only closes the doors of the court to the bringing of suits on such stale claims. It applies, alone, to the plaintiff's cause of action, and not at all to the defense; for, obviously, so long as the courts will hear the plaintiff's case, time cannot bar the defendant's answer. Edwards v. Kinsey's Admr. 14 Ky. Law Rep. 925; Grover's Exr. v. Tingle, 53 S.W. 281, 21 Ky. Law Rep. 885."

The principle that the statute of limitations has no application to a counterclaim arising out of the same occurrence

or transaction sued on is further announced in the case of *Lewis v. Kash*, 239, Ky. 38 S.W. (2d) 978(where the court said and held:

> "As pointed out in the case of Luscher et al v. Security Trust Co. et al, 178 Ky. 593, 199 S.W. 613, L.R.A. 1918C, 615, the cases of Aultman & Taylor Co. v. Meade, 121 Ky. 241, 89 S.W. 137, 28 Ky. Law Rep. 208, 123 Am. St. Rep. 193; Weakley v. Meriweather, 156 Ky. 304, 160 S.W. 1054, and cases cited therein announced the rule that the plea of limitations will not prevail against the right of the defendant to assert by way of counterclaim transactions connected with and growing out of the matter that was the basis of the suit."

The foregoing rule is recognized in Federal procedure, and is stated in *Moore*, Vol. 3 p. 25, as follows:

> "*13.11 Statute of Limitations.*
>
> As pointed out in Sec. 13.02, supra, there is no difference for purposes of pleading between so-called 'set-off', 'recoupment', and 'independent claims'; all constitute counterclaims. This in no way affects the substantive problem as to whether the statute of limitations has run against the claim pleaded as a counterclaim. Thus, recoupment, which is necessarly based on matter arising out of the transaction sued on, when used only to defeat the plaintiff's claim, is never barred by the statute of limitations so long as the main action itself is timely."

THE DEFENDANT, MRS. SMITH, COULD NOT LEGALLY APPEAL FROM THE ORDER AND JUDGMENT OF THE JEFFERSON COUNTY COURT OF MARCH 5, 1952 AND MAY 1, 1952, TO THE JEFFERSON CIRCUIT COURT FOR THREE REASONS:

This Court is in error in holding that Mrs. Smith should have filed an appeal from the "Order and Judgment" of the Judge of the Jefferson County Court of March 5, 1952, and amended May 1, 1952, and that the joint administrators and their attorneys are now entitled to a final judg-

ment for the fees awarded them on May 1, 1952, without a trial of the case and ruling that Mrs. Smith cannot now be permitted to challange this settlement in this action on page 17 of his opinion.

The defendant, Mrs. Smith, could not legally appeal from the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and amended on May 1, 1952, to the Jefferson Circuit Court, because on May 26, 1949, the joint administrators filed an appeal from the "Rule Issued" against them by Judge Horace A. Barker, Judge of the Jefferson County Court, to the Jefferson Circuit Court, No. 314,574. That appeal was not dismissed until July, 1954.

The said "Rule Issued" against the joint administrators ordered them to file a final settlement of the estate of John A. O'Brien, deceased, before May 5, 1949. (On motion of the administrators, the time for filing was extended to July 5, 1949, and on motion of Mrs. Smith, the time was reduced to June 5, 1949.) The "Said Rule" was issued in compliance with the opinion and mandate of the Court of Appeals of Kentucky in the first settlement suit of the joint administrators (See *Smith v. Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 308 Ky. 109; 213 S.W. 2d 989, June 8, 1948; rehearing was denied to the joint administrators on October 29, 1948.) On April 6, 1949, the joint administrators filed a second appeal in the Court of Appeals on their first settlement suit (See defendant's Exhibit "32", pages 31 through 42 of typewritten copy and pages 719a-734a of printed Tr. of Record, which is a photostatic copy of the transcript of records from the Jefferson County Court in the O'Brien Estate.)

When the joint administrators filed their appeal to the Jefferson Circuit Court, No. 314, 574, from the "Rule Issued" against them, they had a supersedeas served on Judge Horace A. Barker, Judge of the Jefferson County

Court on June 2, 1949, in their Jefferson Circuit Court Appeal No. 314574, thus staying all proceedings in the settlement of the estate of John A. O'Brien in the Jefferson County Court. The joint administrators said appeal and supersedeas were not dismissed in that action until July, 1954. See the defendant's Exhibit "G", filed with "Defendant's Motion for Leave to File an Amended Answer and Amended Counterclaim" and filed with the "Tendered Amended Answer and Amended Counterclaim" in this case on February 23, 1957. See Defendant's Exhbit No. 32 from page 713a to 752a, also pages 870-932a in Transcript of Records of the estate of John A. O'Brien from Jefferson County Court. Also see the Defendant's Exhibit No. 33, which is Volume 2 of Transcript of Records from Jefferson County Court, page 942a-943, filed in this Court on August 28, 1959.

This Court has disregarded the fact that when the joint administrators filed their appeal to the Jefferson Circuit Court, they took all of the original records in the estate of John A. O'Brien, deceased, from the office of the Clerk of the Jefferson County Court to the office of the Clerk of the Jefferson Circuit Court. After that, all of the records of the said estate were lost, misplaced, or stolen. The said records were not legally restored until July, 1954, (two years after the order and judgment of the judge of the Jefferson County Court was filed and entered on March 5, 1952, and May 1, 1952), by an order entered in compliance with the opinion and mandate from the Court of Appeals of Kentucky in favor of Mrs. Smith, (See the case of *Smith v. The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company*, 262 S.W. 2d Ky. 479, November 20, 1953.

While the joint administrators second appeal on their first settlement suit was pending in the Court of Appeals of Kentucky, while their appeal to the Jefferson Circuit Court from the "Rule Issued" against them in the Jefferson County Court was pending, the joint administrators on May 19, 1949, filed a second settlement suit of the said estate in the Jefferson Circuit Court, No. 313,655, on March 31, 1949, and a copy of it was filed in Jefferson County Court on May 19, 1949. All of the above steps of the joint administra-

tors' appeals and suits were in defiance of the "Rulings" from the Court of Appeals of Kentucky and the "Rulings" of the Judge of the Jefferson County Court and yet the joint administrators have the audacity to tell this Court that Mrs. Smith and her counsel delayed them in filing a final settlement of the estate of John A. O'Brien, deceased, for twenty-eight (28) years, and until this day they have not filed a final settlement of the O'Brien Estate in the Jefferson County Court.

This Court has disregarded all of the above facts which were briefed in this case and when the joint administrators and their attorneys spent ten (10) or more days in the Jefferson County Court before a Special Commissioner in July, 1951, in December, 1951, and January and February, 1952, introducing records and testimony and obtained the "Order and Judgment" of the Jefferson County Court of March 5, 1952, and of May 1, 1952, there were no records in the estate of John A. O'Brien, deceased, to prove or disprove anything which the joint administrators were contending—*the above reasons set forth are why Mrs. Smith did not file any objections to any item in the joint administrators' so-called final settlements of accounts, because it was not and is not a final settlement of the accounts of the estate, even to this day.*

Mrs. Smith has proven that the only objections that the defendant, Mrs. Smith, filed in the proceedings in the Jefferson County Court and the only appearance made for her during that time *were the objections to the county court judge proceeding with the hearings in the estate in July, 1951, December, 1951, and January and February 1952,* for the above reasons and to save this estate further expenses when all of the records in the estate of John A. O'Brien from January 1, 1934, through June 2, 1949, were still missing. When the joint administrators gave bond and had the clerk of the Jefferson Circuit Court to issue a supersedeas on Judge Horace A. Barker, the then presiding judge of the Jefferson County Court, *the supersedeas was issued at the request of the joint administrators and their attorneys and their names are endorsed thereon by their attor-*

neys, R. Lee Blackwell and Irvin Marcus, (See Defendant's Exhibit "G", filed in this Court on August 28, 1959).

THE COURT OF APPEALS OPINION UPHELD MRS. SMITH'S CONTENTIONS THAT NO FINAL SETTLEMENT OF THE ACCOUNTS OF THE ESTATE HAD BEEN FILED WHEN THE ORDER AND JUDGMENT WAS ENTERED ON MARCH 5, 1952, AND AMENDED MAY 1, 1952.

This Court has disregarded the fact that counsel for the defendant, Mrs. Smith, objected to the Judge of the Jefferson County Court, Boman L. Shamburger, proceeding with hearings for the joint administrators for the above reasons set forth and filed the injunction suit against him for the same reason, and Mrs. Smith was upheld in her contentions by Judge Brady Stewart in his opinion from the Court of Appeals. Although the Court of Appeals refused to enjoin Judge Shamburger from proceeding, they, in effect, held that the settlement of accounts of the estate of John A. O'Brien, deceased, which the joint administrators were trying to have approved *could not be and was not a final settlement of the accounts of the estate of John A. O'Brien, deceased, because*—(1) The joint administrators second settlement suit of the estate of John A. O'Brien, deceased, was still pending in the Court of Appeals of Kentucky, which was filed April 21, 1949, in the Jefferson Circuit Court and (2) That the joint administrators' appeal from the Jefferson County Court "Rule Issued" against them filed May 26, 1949, was still pending in the Jefferson Circuit Court and we quote from the said opinion:

Smith vs. Shamburger, 283 S.W. 2d 844 (Ky.) 848.

"(7) In petitioner's argument in her (Mrs. Smith) briefs, the fact is disclosed that there are two litigations relative to the O'Brien estate pending in the Jefferson Circuit Court: (1) A settlement suit, filed April 21,

1949, and (2) an appeal from the county Court, filed May 26, 1949. The appeal is from an order of Hon. Horace M. Barker, former Judge of Jefferson County Court, directing the Co-administrators to settle the estate. *There has been no final disposition of either of these cases.* It would seem, however, that the filing of the accounting of the Co-administrators in the County Court bestows upon the latter complete jurisdiction to finally determine all issues now in dispute. *If those items now the subject of this controversy had been liquidated in advance of the filing of the accounting, and we believe this should have been done, then in truth and in fact the accounting would have been a final settlement."*

Thus the Court of Appeals, in effect, stated that there could not be a final settlement of the said estate in County Court until after the final decision in the joint administrators' second settlement suit in the Jefferson Circuit Court and until after the joint administrators' appeal in the Jefferson Circuit Court from the Rule Issued in the Jefferson County Court was dismissed, and this was not done until July, 1954.

Even though the Court of Appeals of Kentucky stated in the opinion (supra) that Mrs. Smith could obtain adequate relief from the rulings of the Judge of the Jefferson County Court by an appeal to the Circuit Court, that did not make it mandatory for Mrs. Smith to appeal to the Jefferson Circuit Court from the Order and Judgment of May 1, 1952, of the Jefferson County Court when the Court of Appeals had already held that it was not a final settlement of accounts of the said estate, and that was not Mrs. Smith's only remedy at law. Mrs. Smith had the right to choose between two remedies at law, which, under the laws of Kentucky, are (1) by appeal, or (2) to surcharge and falsify the final settlement of the accounts of the estate by administrators within five years after the final settlement is approved by a judge of the county court. This Mrs.

Smith did so. She filed a suit to surcharge the final settlement of the accounts of the Joint Administrators in the estate of John A. O'Brien, deceased, in the Jefferson Circuit Court at Louisville on February 28, 1957, and she tendered her "Amended Answer and Amended Counterclaim" in this court February 23, 1957. See the cases of:

Turley's Administrator vs. Barnes, etc., 103 Ky. 127; 44 S.W. 446, 20 K.L.R. 1808;

Scott's Heirs vs. Kennedy's Executor, 12 B.M. 516;

Stanbury's Admr. vs. Robinson, 16 Ky. Law. Rep. 310; all of which was cited on pages 11 and 12 of the defendant's Patricia R. Smith, brief, in support of "Defendant's Motion to File her Amended Answer and Amended Counterclaim," filed in this court on March 18, 1957, a copy of which was mailed to this Court at Grand Rapids, Michigan, in September, 1959.

At top of page 11 of the opinion, this Court admits that there are two ways to attack the final settlement of accounts of an administrator in county court:—

(1) By an appeal;

(2) To surcharge the final settlements of accounts of an estate by an administrator witihn five years after the final settlement, if no exceptions are filed.

This Court is in error when it states that the defendant, Mrs. Smith, participated in the proceedings leading to approval of the final settlement of accounts in county court—there is nothing in this record to support such conclusions.

The records in this case prove that Mrs. Smith *did not file any exceptions to any item in the so-called final settlement of accounts.* Mrs. Smith did not appear in the county court at any of the hearings in July, 1951, December 1951, January, 1952, or March 1952, even though the joint administrators had a subpoena served on Mrs. Smith in an attempt to force her to appear in county court to partici-

pate in the proceeding and hearings. Mrs. Smith did not go and could not go for she had broken her right ankle in three places. She could not wear a cast on her ankle and was forced to remain in bed for approximately three months.

The records in this case prove that no exceptions were filed by Mrs. Smith to the county court's settlement of accounts and they were confirmed without exceptions. In the case of *Andrews, et al, v. McCarty, et al,* 208 Ky. 25; 270 S.W. 466. It held that:

> "(2) On the other hand it has been held by this court in a long line of cases that the order of the county court confirming such a settlement without exceptions is not a judicial decision, but, as the ward is not before the court, partakes rather of the character of a ministerial act. The confirmation is not conclusive upon the parties and the court itself may order another settlement in which errors in the first may be corrected. Such settlements are only prima facie evidence subject to surcharge, and they operate rather as a means of preserving evidence. Scott v. Kennedy, 12 B. Mon. 510; Bell v. Henshaw, 91 Ky. 430, 15 S.W. 3, 12 Ky. Law Rep. 674; Turley v. Barnes, 103 Ky. 127, 44 S.W. 446, 19 Ky. Law Rep 1808; Caplinger v. Pritchard, 136 Ky. 349, 124 S.W. 352. In the case last cited the court said this:"
>
> " 'An action may be instituted in equity in the circuit court surcharging his settlements, and force him to account for what he owes the estate. • • •
>
> 'The rule is well established that when a settlement of a fiduciary is contested in the county court, and that court tries the exceptions on their merits, the remedy of the aggrieved party is by appeal, *but not so when there is no trial*, and his exceptions are dismissed without a hearing, as in the case at bar.'
>
> "(3) The county court settlement, confirmed without exceptions, not being void and being subject to surcharge when the answer was filed pleading this settlement, the plaintiff regularly should have amended his

petition and alleged the errors in it. If he had done this the action might have proceeded regularly as an action in equity to surcharge that settlement. While this was not done in form, everything that would have been accomplished by such an amendment to the petition was done by the exceptions filed to the settlement in the circuit court. The exceptions set up every fact that should have been set up in an amended petition to surcharge the county court settlement. Proof was taken on these exceptions and the case was heard on the merits. While the proceeding was irregular no substantial rights of the defendants was prejudiced. Section 134 of the Civil Code of Practice provides:

> " 'The court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.' "

The above case clearly proves Mrs. Smith's contentions that if no exceptions are filed in county court, the confirmation of the settlement of accounts is not conclusive upon the parties. Therefore, the "Order and Judgment" of the county court of March 5 and May 1, 1952, is not binding on anyone.

THIS COURT IS IN ERROR WHEN IT HOLDS THAT THE UNITED STATES DISTRICT COURTS HAVE NO JURISDICTION OVER PROBATE MATTERS.

This Court is in error when it holds that the United States District Courts have no jurisdiction over probate matters.

In the case of First National Bank & Trust Company, Guardian for Marie Therese Corby, Plaintiff, vs. Madeline Corby Morgan Webber, etc., Defendants, filed in the District Court of the United States for the Eastern District of Kentucky at Covington, February 7, 1934:

Defendant Patricia R. Smith's Petition For Rehearing

In a motion to remand the above styled case, counsel, for the plaintiff moved to remand this case to the Kenton Circuit Court because of lack of jurisdiction in the Federal Court. The argument was in substance as follows:

"We have no probate courts in Kentucky. We have County Courts which have probate jurisdiction and the probate jurisdiction which they have is of a very limited character. They have power to probate wills, to appoint and remove personal representatives and guardians and to state their accounts which is called a settlement thereof. This is all the power they have. They do not have possession of the estates or jurisdiction of the res. They do not have power to make orders as to the handling by personal representatives or guardians of the estate in their hands or as to their dispostion or distribution. The personal representatives and guardians handle, dispose of and distribute the estate in their hands as the law requires them to do, and after they have so done they go before the county judge and state or settle their accounts and his action may be carried by exceptions to the county court and circuit court and Court of Appeals.

"By express provision of the Civil Code of Practice of Kentucky the circuit courts of the state are given jurisdiction of suits against personal representatives and guardians for the jurisdiction of the Courts of this State."

There were other arguments involved, but on March 30, 1934, Judge A. M. J. Cochran, judge for the Eastern District of Kentucky, gave the following opinion in over-ruling the motion to remand:

"There is no conceivable reason, requisite diversity of citizenship existing and amount in controversy being sufficient, why such a suit cannot be brought originally in this court or if brought in the state circuit court why it may not be removed to this court. If there is an action or suit which can be brought in the state circuit court, of which this court does not have jurisdiction,

original or on removal, if diversity of citizenship exists and the amount in controversy is sufficient it does not occur to me. I do not find it necessary to go into the authorities on the question. The lack of any authority exactly in point is due to the fact that in many, if not most of the jurisdictions of this country, there are probate courts with the powers and jurisdiction heretofore stated. Decisions that federal jurisdiction does not exist of probate matters and to the effect that in such jurisdictions the federal courts have jurisdiction to determine the rights of the parties, but no more, are indirect authorities in support of the position here taken. Those decisions are based on the ground that the probate courts have jurisdiction of the res. As we have no probate courts and as such probate jurisdiction as county courts have is of the limited character above pointed out, it necessarily follows that the federal courts in this state have full jurisdiction of the settlement of the accounts of personal representatives and the disposition and distribution of the estates in their hands. In exercising such jurisdiction, they do not invade the exclusive jurisdiction of any state court. The motion to remand is overruled."

In the case of *Griffith v. Bank of New York*, 147 Fed. 2d 899, February 16, 1945, which is applicable to the instant case, holds:

"1. Courts—262(1)

The federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court's judgment obtained by fraud.

"2. Courts—262(1)

An action could be maintained in federal court by residuary legatee against testamentary trustee for damages for breach of duty as trustee and duress in forcing legatee to consent to judgment of New York court settling trustee's account, if elements of federal jurisdiction appeared, although action was a collateral attack on the New York Supreme Court's judgment, where consent to the judgment was alleged to have been procured by

trustee's threat to tie up the property indefinitely unless settlement was made.

"3. Courts—198

Under New York Surrogate's Court Act, a Surrogate's Court has jurisdiction to vacate and set aside release obtained by fraud, and the fact that a judgment is involved raises no obstacle to exercise of jurisdiction, Surrogate's Court N. Y. 40.

"6. Judgment—713(2)

A judgment other than on the merits is conclusive only as to point expressly decided, and it is not res-judicata on points which might have been included, but were not adjudicated.

"7. Judgment—828(3)

An action in federal court by residuary legatee against testamentary trustee for damages as result of breach of duty and duress in forcing legatee to consent to judgment of a New York Supreme Court settling trustee's account was not barred by judgment of a New York Surrogate's Court dismissing petition seeking resettlement of trustee's account, where surrogate dismissed petition for reasons not going to the merits.

"11. Courts—262(1)
Judgment—441

Where residuary legatee alleged that testamentary trustee had breached its duty as trustee and had used duress in forcing legatee to consent to a judgment of New York Supreme Court settling its account as trustee legatee's remedy was equitable and could be brought in either state or federal courts.

"14. Courts—260

Generally federal courts in diversity of citizenship cases should decide questions even involving state law unless some exceptional circumstances of a stereotyped nature intervene."

The above cited case definitely holds that district courts of the United States do have jurisdiction over cases like the instant case, as we have set out above, and states:

"Though the settlement thus envisaged has been fully consummated, plaintiff now alleges that her consent was obtained by duress, and that she has been damaged by the duress practiced upon her. Acts constituting the duress are alleged to be defendant's willful withholding of principal and income of the estate, initiation of unnecessary and expensive litigation exhausting this plaintiff and her co-beneficiary financially (referring to the action for construction of the will which resulted in a decree sustaining the validity of the trust, Bank of New York v. Kaufman, Sup., 26 N.Y.S. 2d 474, affirmed 261 App. Div. 818, 25 N.Y.S. 2d 408, leave to appeal denied 261 App. Div. 898, 26 N.Y.S. 2d 316; 285 N.Y. 854, 33 N.E. 2d 566), and threatened additional unfair and oppressive expense of litigation and withholding of the estate, coupled with refusal of information as to the trustee's conduct of the trust, bringing plaintiff to "a point of discouragement and despair" and fear of loss of her estate, so that she was not in a position to contract freely or negotiate a fair settlement with defendant."

"For it is well settled that the federal courts may exercise their equity powers so as to set aside, enjoin enforcement of, or ignore a state court judgment obtained by fraud. Marshall v. Holmes, 141 U. S. 589, 12 S.Ct. 62, 35 L.Ed. 870. And though it was once thought necessary that such fraud be "extrinsic," so that it could not have been considered in the original action, United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93, the later cases no longer seem to adhere strictly to even this limitation. Marshall v. Holmes, supra; Publicker v. Shallcross, 3 Cir., 106 F.2d 949, 125 A.L.R. 386, certiorari denied 308 U.S. 624, 60 S.Ct. 379, 84 L.Ed. 521; cf. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245, 246, 64 S.Ct. 997."

"(2) But putting aside the unsettled question whether cases such as those of Holmes and Publicker definitely mark the elimination of the Throckmorton restriction, cf. Graver v. Faurot, 162 U.S. 435, 16 S.Ct. 799, 40 L.Ed. 1030, the District Court erred because the duress or fraud here involved was, as alleged, sufficient to have

warranted a chancellor in disregarding or setting aside the prior judgment. Since the consent to that judgment is alleged to have been procured by the trustee's threat to tie up the property indefinitely unless settlement was made, this case is substantially identical with Ingram v. Lewis, 10 Cir., 37 F.2d 259, 70 A.L.R. 702, certiorari denied 282 U.S. 842, 51 S.Ct. 22, 75 L.Ed. 747, where a judgment of dismissal of an action for an accounting was disregarded by the federal court, since such dismissal was based on a release obtained by the trustee on threat of withholding the property. See also Park v. Park, 5 Cir., 123 F.2d 370; Seay v. Hawkins, 8 Cir., 17 F. 2d 710; Jefferson v. Gypsy Oil Co., 8 Cir., 27 F. 2d 304; Horton v. Stegmyer, 8 Cir., 175 F. 756, 758, 20 Ann. Cas. 1134."

"Though the court in the Ingram case, supra, did not in so many words classify the case as one of "extrinsic" fraud, both the situation there presented and the one before us seem clearly to be so characterized if we are bound to hold the powers of a court of equity thus restricted. For the very duress by which the release or consent is obtained also prevents the coerced party from challenging before or at trial the statements or conduct of its adversary. Thus in the original action the issue of duress never is before the court. Indeed, the case differs little, if at all, from those where a witness is forcibly prevented from testifying, or an attorney is bribed to fight a losing battle or give his client false advice."

". . . . We think, therefore, that no sufficient ground for dismissal of this action has been shown. Of course, we do not pass upon the existence of actual duress or coercion; that cannot be decided upon the mere face of the complaint.

"Reversed and remanded."

The above cited Griffith case clearly indicates that the United States District Courts have jurisdiction and have assumed jurisdiction of probate matters similar to the instant case in similar jurisdictions throughout the United

States. The above cited case is definitely in point with the instant case.

The defendant, Mrs. Smith, should be permitted to file her "Amended Answer and Amended Counterclaim" tendered herein on February 23, 1957.

The records show that Mrs. Smith did not take part in any of the proceedings in the final settlement of accounts in county court. She did not appear or file any exceptions. She did not have any remedy by appeal.

We respectfully request this Court to withdraw the opinion filed and entered in the within case on March 4, 1961, and to enter an opinion over-ruling the "Plaintiffs' motion for Summary Judgment" as to the "defendant's original Counterclaim included in Defendant's original answer" filed herein on November 12, 1956, granting Mrs. Smith the right to file her "amended answer and amended counterclaim" herein, and declare the order and judgment of March 5 and May 1, 1952, of the Judge of the Jefferson County Court, void and of no effect, and that the settlement in the county court is only prima facie evidence subject to surcharge.

Respectfully submitted.

s/ Walter B. Smith

WALTER B. SMITH
Counsel for the Defendant,
Patricia R. Smith,
801 Columbia Building
Fourth and Main Streets
Louisville 2, Kentucky

April 3, 1961.

CERTIFICATE OF SERVICE

I certify that on April 3, 1961, I served the foregoing "PETITION FOR REHEARING ON THIS COURT'S OPINION (JUDGE W. WALLACE KENT) RENDERED AND FILED IN THE ABOVE STYLED CASE ON MARCH 4, 1961," upon the Plaintiff, The Louisville Trust Company and The Citizens Fidelity Bank & Trust Company, by that day mailing a copy thereof to their attorneys, Mr. Irvin Marcus, addressed to him at 1417 Kentucky Home Life Building, Louisville 2, Kentucky, and to Mr. Lee Blackwell, addressed to him at 1700 Kentucky Home Life Building, Louisville 2, Kentucky, postage prepaid, and deposited in the United States mail.

s/ Walter B. Smith

WALTER B. SMITH
Counsel for Patricia R. Smith.

ENTERED
APRIL 3, 1961
MARTIN R. GLENN, Clerk
By /s/ A. Rigsby
Deputy Clerk

A Copy: Attest
Martin R. Glenn, Clerk
By /s/ Loraine Miller
Deputy Clerk.